Jurisdictional Statement

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NO.

in the Supreme Court of the United States

October Term, 1981

MARK IZZARD, WAYNE LAMAR KACKLEY, JAMES GILBERT COWHEARD, JACKSON LOCKARD HOWELL,
Appellants,

vs.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

(As to Constitutionality *Vel Non* of Statute)

I

Whether the Florida Drug Trafficking Statute imposing a mandatory minimum sentence, without parole, on a convicted defendant for the purpose of compelling him to provide "substantial assistance" coerces a defendant into relinquishing his Fifth Amendment privilege against self-incrimination by denying him leniency unless he provides information which is self-incriminatory with no offer of immunity.[1]

II

Whether the Florida Drug Trafficking Statute Violates the Equal Protection Clause of the Fourteenth Amendment where a convicted defendant who can not provide "substantial assistance" is ineligible to receive a reduction or suspension of his sentence; whereas, a convicted defendant who is more culpable and in a higher echelon of a criminal organization is able to provide "substantial assistance" and thereby have his sentence reduced or suspended.

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[1]This issue was raised in several appeals to this Court. *E.g.*, *Blalock v. Florida*, Case No. 8-712; *Cowgill v. Florida*, Case No. 81-743; *Wall v. Florida*, Case No. 81-782; *Billford v. Florida*, Case No. 81-1621. Although jurisdiction was declined by the Court, none of the defendants in the foregoing cases had gone to trial. Accordingly, there were no sentences and the jurisdictional requirement as to finality was absent. In the instant case all the appellants have been convicted and sentenced. All are incarcerated except Izzard, who will be imprisoned May 14, 1982.

III

Whether the leniency provision of the Florida Drug Trafficking Statute is unconstitutional because a) the phrase "substantial assistance" is impermissibly vague denying due process; or b) violates due process requirements of the Fourteenth Amendment by imparting unreviewable discretion solely to the prosecutor to move the sentencing court to reduce or suspend the mandatory minimum sentence.

IV

Whether the Florida Drug Trafficking Statute is violative of the Eighth Amendment's prohibition against cruel and unusual punishment by establishing severe mandatory minimum terms of incarceration upon a convicted defendant who chooses to remain silent and assert his privilege against self-incrimination; and precludes the trial judge from considering any mitigating factors.

(As to the Fourth Amendment Violation)

V

Whether petitioners' Fourth and Fourteenth Amendments rights in light of *Franks v. Delaware* were violated where the finding of probable cause was based on the police officer's affidavit in which he swore, with reckless disregard for the truth, that he observed clearly at night, through a visual aid, bales of marijuana being off-loaded from a boat by three white males, when he testified later at a suppression hearing that he could see only figures of persons carrying bundles to a house.

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Appellants,

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Appellee.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

JURISDICTIONAL STATEMENT

Appellants, Mark Izzard, Wayne Lamar Kackley, James Gilbert Cowheard and Jackson Lockard Howell appeal to review the final judgment of the District

Court of Appeal of Florida, Fourth District, dated December 16, 1981, reading: "PER CURIAM. AFFIRMED." This judgment, although not in express language, held, in effect, that the Florida Drug Trafficking Statute, §893.135, Florida Statutes, is valid and not repugnant to the Constitution.[2]

Additionally, the appellate court, without opinion, upheld a questioned search and seizure.

OPINIONS BELOW

This case is unreported as of this date. A copy of the judgment and opinion sought to be reviewed, a copy of the trial court's order denying the motion to dismiss and upholding the validity of the state statute, and a copy of the trial court's order denying the motion to suppress are incorporated in the appendix (A 1, 18, 22).

JURISDICTION

As to the Issue of the Constitutionality of the Statute Raised by Questions I-IV

The genesis of this action was a criminal prosecution against the appellants in the Circuit Court for Palm Beach County, Florida, charging them with trafficking in marijuana contrary to §893.135(1)(a)(2), Florida Statutes (1979).

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[2]The Supreme Court of Florida in *State v. Benitez*, 395 So.2d 514 (Fla. 1981), upheld the constitutionality of the drug trafficking statute. The constitutional attack raised in this case was raised in *Benitez*. *See fn. 1, supra.*

Appellants filed a motion to dismiss alleging, *inter alia*, the constitutional infirmities presented in this Appeal (A 34). The motion was denied by the trial court (A 18).

Upon convictions and sentences of mandatory minimums of five years, appellants appealed to the District Court of Appeal of Florida, Fourth District.[3] The District Court of Appeal affirmed the trial court in a final judgment, without opinion, dated December 16, 1981 (A 1).

Appellants' timely motion for rehearing was denied on February 10, 1981 (A 14).

A notice of appeal to this Court was filed in the District Court of Appeal of Florida, Fourth District on May 3, 1982 (A 15). A copy of the notice was filed with the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida.

This appeal is being docketed within 90 days from the denial of the rehearing below.

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[3]Appellants were adjudged guilty of trafficking in marijuana after entering pleas of nollo contendere, specifically reserving the right to appeal the denial of the motion to dismiss based on the constitutionality of the drug trafficking statute and reserving the right to appeal the denial of the motion to suppress the evidence.

The decision of the District Court of Appeal is the final decision of the highest court in Florida in which a decision could be had.[4]

This Court has jurisdiction under 28 U.S.C. §1257(2).

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[4]Article V, Section 3(b), Florida Constitution, reads:

§3. *Supreme Court*

(b) Jurisdiction.—The Supreme Court:

(3) May review any decision of a district court of appeal that *expressly* declares valid a state statute, or that *expressly* construes a provision of the state or federal constitution, or that *expressly* affects a class of constitutional or state officers, or that *expressly* and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law. (Emphasis added.)

In *St. Paul Title Insurance Corp. v. Davis*, 329 So.2d 1304 (Fla. 1981), the Supreme Court of Florida reaffirmed its holding in *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980), that the constitutional amendment in 1980 of Article V, §3(b)(3), does not permit any review of District Courts' decisions which merely read in their entirety: "Per Curiam. Affirmed". Also, the Supreme Court of Florida in its Manual of Internal Operating Procedures as Amended to March 24, 1981, under II, A 1(a) provides ". . . if there is no [district court of appeal] opinion, the case is automatically dismissed." Under the foregoing circumstances, the District Court of Appeal of Florida, Fourth District, was the highest court in Florida where a decision could be had as required by 28 U.S.C. §1257(2). *Cf., Nash v. Florida Industrial Commission*, 389 U.S. 235, 239, 19 L.Ed.2d 438, 88 S.Ct. 362 (1967), n. 1, and *Williams v. Florida*, 399 U.S. 78, 80, 26 L.Ed.2d 446, 90 S.Ct. 1893 (1970), n. 5.

As to the Fourth Amendment Issue Raised by Question V

Appellants filed a motion to suppress the evidence in the trial court, alleging, *inter alia*, that probable cause standards for the issuance of a search warrant were not met by the affidavit (A 63). An evidentiary hearing was held. A memorandum of law in support of the motion to suppress was filed following the evidentiary hearing attacking the veracity of the warrant affidavit as not comporting with the Fourth and Fourteenth Amendment requirements as set forth in *Franks v. Delaware*, 438 U.S. 154, 57 L.Ed.2d 667, 90 S.Ct. 2674 (A 77).

The trial court denied the motion to suppress finding that the testimony is clear that the affiant officer knew from the shape of the bales that they contained marijuana (A 22).

Before the District Court of Appeal, the petitioners urged that the motion to suppress should have been granted where the affiant, police officer, knowingly and intentionally made material false statements in the warrant affidavit essential to establish probable cause. The District Court of Appeal affirmed, without opinion, rejecting appellants' Fourth and Fourteenth constitutional claims (A 1, 91).

CONSTITUTIONAL PROVISIONS AND STATUTES

The Constitutional provisions involved are Amendments IV, V, VIII, and XIV, of the Constitution of the United States. The challenged statute involved is Section 893.135, Florida Statutes (1979). Inasmuch as

the provisions involved are lengthy, the pertinent text is set forth in the appendix (A 28).

STATEMENT OF THE CASE

As to the Constitutionality *Vel Non* of the Statute Raised By Questions I-IV

The facts material to a consideration of Questions I through IV are as follows: Florida had been singled out by the media as the drug capital of this country. Due to adverse publicity concerning the flow of drugs into Florida, the State Legislature and Florida's Governor were determined to stem the flow of drugs into the state. Simply stated, the problem of drug trafficking in Florida was becoming a political embarrassment to elected officials as the electorate clamored for action.

In this climate the State Legislature enacted Section 893.135, Florida Statutes (A 30).[5]

The first subsection of the statute provides, in pertinent part, that any person who is knowingly in actual or constructive possession of in excess of 100 pounds of cannabis is guilty of a felony of the first degree which felony shall be known as "trafficking in

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[5]The Drug Trafficking Statute was the first statute to be enacted during the 1979 session. Chapter 79-1, *Laws of Florida*, 1979, Gen. Acts, Vol. 1, Part One. The Senate Bill S0083 was placed on the Special Order Calendar on April 5, 1979, and passed with only two dissenting votes. A day later, April 6, 1979, the House of Representatives passed the Bill with no dissenting votes. On the same day the Governor signed the Bill. *See Florida Legislative-History of Legislation, 1979 Regular Session*, p. 26.

cannabis". Section 893.135(1), *supra*. If the quantity of cannabis involved is 2,000 pounds or more, but less than 10,000 pounds, a convicted person shall be sentenced to a mandatory minimum term of imprisonment of 5 calendar years and pay a fine of $50,000. Section 893.135 (1)(a)(2). The next subsection of the trafficking act provides that adjudication of guilt or imposition of sentence shall not be suspended, deferred or withheld, nor shall the convicted person be eligible for parole prior to serving the mandatory minimum term of imprisonment prescribed by this section. Section 893.135(2), *supra*.

Then the third subsection, the so-called "escape valve" from the mandatory minimum term of imprisonment provides:

> The state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if he finds that the defendant rendered such substantial assistance.

Section 893.135(3), *supra*.

During the Senate debate on the proposed statute[6] an amendment was offered to eliminate the mandatory minimum terms of imprisonment. Senator Spicola, a staunch supporter of the proposed statute, helped in defeating the amendment with the following statement which, in essence, sums up the legislative purpose and scheme in promulgating the challenged statute:

Spicola stated to the Senate:

> Mr. President: Senators: Briefly, this is just another amendment by the few on the floor here that have what I feel are not the strong prevalent view of our constituents as to our drug laws that will actually in this amendment actually goes to the heart of this bill. Because, if this amendment is adopted, you in effect will go back to the existing law, and if it is adopted the whole concept behind this bill, the whole idea that when this guy that pilots the boat in or pilots the plane in that when he is apprehended, and when he is sentenced to a minimum mandatory sentence, and when he hears the jail door slammed shut he will not know that he will be in there for three years, or ten years, or fifteen years, and then the whole incentive, *the whole object of the bill to make him cooperate*, so we for once can move from just apprehending the mules and can move up to the thoroughbreds, to apprehend

[6]Senate Bill No. 0083.

> the generals, instead of the privates, in this state, that will not be available and with this amendment there is no sense in passing this bill.[7] (Emphasis added.)

The "rubber hose" mentality of the legislators reflected in the provisions of the trafficking statute will be discharged more fully, *infra*.

Questions I-IV, *supra*, sought to be reviewed were raised in the first instance in the Circuit (trial) Court of Palm Beach County by a pre-trial motion to dismiss (A 34).[8]

The trial court passed upon the constitutional issues by a written order denying appellants' motion to dismiss (A 18). This order incorporated an order entered in another case, *State v. Elmore*, which sets forth the trial judge's reasoning in holding the questioned statute constitutional (A 19).[9]

The constitutional issues raised in the trial court were raised again in the District Court of Appeal, Fourth District, in the appellants' initial brief with

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[7]Excerpt from tape of Senate debate on Senate Bill No. 0083.

[8]The constitutional grounds raised in the motion to dismiss were amplified in a memorandum of law in support of the motion to dismiss (A 43).

[9]The trial judge in the order, incorporated by reference, omitted any citation of authority in support of his order on the basis that the Supreme Court of Florida will be ruling on the constitutionality of the statute before the cases become ripe for trial (A).

reference made to the *Benitez* case then pending in the Supreme Court of Florida (A 108-109).[10]

The District Court of Appeal passed upon the constitutional questions (after the *Benitez* case had been decided) by issuing an opinion reading: "PER CURIAM. AFFIRMED." (A 1).

Inasmuch as the Supreme Court of Florida's decision in *Benitez* was dispositive of the case, *sub judice*, in the District Court of Appeal, it is necessary to advert to the former court's reasoning in upholding the statute as not being repugnant to the federal Constitution (A 3).[11]

The Florida Supreme Court in *Benitez* concedes that the legislators, in their zeal to combat the flow and distribution of illegal drugs through this novel legislation, "knowingly glossed over alleged constitutional

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[10]The *Benitez* case was heard by the Supreme Court, which had jurisdiction to hear appeals from orders of trial courts initially and directly passing on the validity of a state statute or construing a provision of the state or federal constitution. By a special election on March 11, 1980, however, the Supreme Court's jurisdiction under Art. 5, §3, Florida Constitution, to review orders of trial courts initially and directly passing on the validity of a state statute or construing a provision of the state or federal constitution was deleted and such jurisdictional power then vested in the District Courts of Appeal. Art. 5, §4, Florida Constitution. Art. 5, §4, in pertinent part provides that the District Courts of Appeal, have jurisdiction to hear appeals that may be taken as a matter of right from final orders or judgments of trial courts.

[11]Although the *Benitez* decision was not appealed to this Court, other cases reversed on authority of *Benitez* were appealed to this Court. See fn. 1, *supra*.

defects in the approach that was being developed." 395 So.2d at 517.

On the self-incrimination issue (Question I), the Florida Supreme Court states that nothing in the statute suggests that "substantial assistance" must incriminate the defendant of crimes other than those for which he has already been convicted. On the other hand, the Florida court states: "We acknowledge the risk of prosecution in other jurisdictions." Ibid. In any event, the Court found that a defendant need not invoke Subsection (3), as nothing in the statute is compulsive. Ibid.

Then, the Florida Supreme Court found that the cases relied upon by the defendants which say that the trial courts may not enhance a sentence based on a defendant's failure to cooperate with the authorities are of small comfort because of this Court's decision in *Roberts v. United States*, 445 U.S. 552, 100 S.Ct. 1358, 63 L.Ed.2d 622 (1980). *Roberts* held that a federal district court judge may properly consider the defendant's refusal to cooperate as one factor in imposing consecutive sentences.

As to the violation of the equal protection clause (raised in Question II), the Supreme Court of Florida resolves that issue in two sentences. The court stated that Subsection (3) does not deny equal protection of the law to convicted defendants who cannot provide "substantial assistance" to law enforcement officials, since the legislation "manifestly passes the rational basis test". Id. at 519.

On the due process-vagueness issue (raised in Question III), the Florida Supreme Court held that the phrase "substantial assistance" involves a description of a *post-conviction* form of plea bargaining rather than a definition of the crime itself. Thus, the phrase "substantial assistance" can tolerate subjectivity to an extent which normally would be impermissible for penal statutes. The Court concluded that the contested phrase in any event is susceptible to common understanding in the context of the whole statute. Id. at 518-19.

As to the other issue (raised in Question III) that the ameliorating effect of Subsection (3) cannot be invoked, except by the prosecutor who has unreviewable discretion to move the sentencing court to reduce or suspend the mandatory minimum sentence, the Florida Supreme Court concluded that under the statute the ultimate decision on sentencing resides with the judge who must rule on the motion for reduction or suspension of sentence. Therefore, the statute, according to the Supreme Court, does not wrest from the trial judge the final discretion to impose sentence. Id. at 519.

On the issues involving the Eighth Amendment violations (raised in Question IV), the Supreme Court found that the prohibition against cruel and unusual punishment was not violated by the mandatory minimum sentences in that said sentences were not unnecessarily severe and disproportionate to the nature of the crime in light of the potential deterrent value and seriousness of the crime involved. Id. at 517-18. Also, the Court stated that the mandatory minimum sentences in §893.135, did not violate the Eighth Amendment on the theory that the mandatory minimum sentence unconstitutionally eliminates exercise of discretion in sentencing. Ibid.

As To The Fourth Amendment Issue Raised By Question V

Officer Brady stated in the affidavit in the application for a search warrant, for the purpose of establishing probable cause, the following:

> At approximately 1 a.m., July 3, 1979, your Affiant and Ptlm. Osberg *observed three (3) white males,* dressed in dark clothing proceed out to the vessel "NERRISSA" and subsequently were observed by your Affiant and Ptlm. Osberg to off-load at least 15 large bales of what your Affiant has observed on previous occasion to be marijuana. Said subjects were observed by your Affiant to be carrying the bales off of the vessel "Nerrissa" and into the west door of the resident at 721 Marine Drive, Boca Raton, Florida.
>
> Your Affiant was aided in these observations with *the use of a Startron night scope, which through the viewer's eye illuminates the area that is observed, so that said subjects and bales of marijuana were clearly seen by your Affiant.* (A 68). (Emphasis added.)

Nothwithstanding the contents of Brady's affidavit, the latter testified at the suppression hearing as follows:

> Q. Now, I want to go back to one other area, the night scope you were looking through. (T 53)[12]

[12]Reference to the record in the State Court will be by the use of the symbol "T".

"A Yes, sir.

"Q Could you even tell from looking through it whether the people you saw were white people or black people or oriental people or anything like that?

A No, sir.

Q All you could see was figures, is that a fair statement? (T 54)

A. Yes, sir.

Q. Figures of persons, figures of bundles?

A. Yes, sir.

Q Or packages or what have you, is that a fair statement?

A Yes, sir.

Brady testified further that he could not tell if the packages had handles, were wrapped in rope or twine, or, indeed anything else about the packages other than their shape (T 49-50, 58). In fact, all he could see with the night scope were "[f]igures of persons, figures of bundles." (T 54).[13]

[13]Patrolman Osberg, referred to in the affidavit, testified prior to Brady that he could see better with his own eyes than with the night scope, and that he could discern "something like large bundles" and figures carrying something (T 32-35).

Following the evidentiary hearing on the motion to suppress, appellants filed a memorandum of law (A 77). In their memorandum the appellants contended the evidentiary hearing revealed that Officer Brady knowingly made false statements or had a reckless disregard for the truth when he stated in his affidavit that he observed clearly "the subjects and bales of marijuana with the use of the night scope which illuminated the area." (A 79).

Further, the appellants contended that *Franks v. Delaware, supra,* was controlling and that the false statements in the affidavit vitiated the warrant since the erroneous statements were material to the establishment of probable cause (A 83-89).

The trial court denied the motion to suppress finding that the affiant's testimony as well as the corroborating testimony of an officer showed the affiant could not identify the [color or sex] of the persons carrying the bales; but, that the testimony is clear the affiant/officer knew from the shape of the bales that they contained marijuana (A 25).

The same issues raised in the motion to suppress and the memorandum of law were raised again in the District Court of Appeal, Fourth District (A ; p. 5, *supra*).

The District Court of Appeal affirmed, without opinion, rejecting the appellants' Federal constitutional claims based on *Franks v. Delaware.*

QUESTIONS PRESENTED ARE SUBSTANTIAL

I. The Privilege Against Self-Incrimination

The Drug Trafficking Statute was passed with the purpose, *inter alia*, to assist law enforcement authorities in the investigation and prosecution of illegal drug trafficking at all levels of distribution. *State v. Benitez*, *supra*, at 517.

The means employed, however, in the statutory language to force drug violators to cooperate with law enforcement authorities and become informers is repugnant to the constitution. As noted by the Florida Supreme Court in *Benitez*, the Legislature knowingly glossed over alleged constitutional defects through this novel legislation. Id. at 517. The "constitutional defects" arise out of the avowed purpose and legislative scheme to compel, coerce and "rubber hose",[14] convicted defendants to give up their right to silence and inform on others or forfeit any hope of leniency.

In former times, persons suspected of criminal activity or persons convicted of crimes would be subjected to physical torture in order to compel them to talk, to incriminate themselves or others. Here, in a similar, but more sophisticated manner, the Legislature of Florida has enacted Section 893.135, *supra*, to assist law enforcement authorities in the investigation and

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[14]See statement of Senator Spicola at page 8, *supra*, that the whole object of the bill is to make the incarcerated defendant cooperate. Also, State Representative Martinez, accurately and graphically described the legislative purpose by stating: "You are hitting the guy with a rubber hose."

prosecution of drug traffickers, by figuratively placing convicted defendants upon a "mental rack" by mandating severe, minimum terms of imprisonment without parole unless the defendants cooperate, talk, and incriminate themselves all contrary to their Fifth Amendment right against self-incrimination.

It is patently evident that the effect of the Drug Trafficking Statute is to compel the sentenced defendant to break his silence, to forego his Fifth Amendment privilege against self-incrimination, and to do so without any coextensive grant of immunity contrary to the Fifth and Fourteenth Amendments.

It cannot be contradicted that a person who renders "substantial assistance" can only tend to furnish a link in the chain of evidence needed to prosecute the claimant for a crime. *Hoffman v. United States*, 341 U.S. 479, 81 S.Ct. 814, 95 L.Ed. 1118 (1951).[15]

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[15]In *Hoffman*, the petitioner had asserted his privilege against self-incrimination under the Fifth Amendment. Under the procedures set forth in Section 893.135(3), *supra*, the sentenced person must first provide substantial assistance before the state attorney may move the sentencing court to reduce or suspend the sentence. Obviously, a sentenced defendant cannot invoke his Fifth Amendment privilege in the usual manner under this procedure. He has no opportunity to state: "I refuse to render 'substantial assistance' on the grounds that doing so might tend to incriminate me." He must render the "substantial assistance" under subsection (3) by cooperating before there is any proceeding had before the Court. Thus the fear of self-incrimination was fairly and timely brought to the attention of the trial court based on the statutory violation of the privilege against self-incrimination.

In other words, the statute compels a waiver of immunity by threatening the execution of a mandatory minimum sentence unless the convicted defendant testifies against his own interest. See *Murphy v. Waterfront Commission of New York*, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1974); *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 625, 17 L.Ed.2d 574.[16]

Thus, in effect, the defendant is punished by his silence and rewarded only if he talks. Such sentencing procedures are unconstitutionally coercive. *E.g.*, *Thomas v. United States*, 368 F.2d 941 (5th Cir. 1966); *United States v. Rodriguez*, 498 F.2d 301 (5th Cir. 1974); *United States v. Rogers*, 504 F.2d 1079 (5th Cir. 1974).

This Court in *Roberts v. United States*, 445 U.S. 552, 63 L.Ed.2d 622, 100 S.Ct. 1358, held that the District Court, in sentencing the defendant Roberts, properly considered (as a sentencing factor) his refusal to cooperate with government officials by failing to name drug suppliers, since by declining to cooperate the defendant rejected a community obligation and protected his former partners in crime, thereby preserving his ability to resume criminal activity upon release. At the trial court level, Roberts simply refused to name suppliers. At the appeal level, Roberts' counsel raised for the first time in his brief that the District Court was punishing him for exercising his Fifth Amendment privilege against self-incrimination. This Court held:

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[16]It is recognized in *Garrity* that coercion that vitiates a confession can be "mental" as well as "physical", as "the blood of the accused is not the only hallmark of an unconstitutional inquisition." 385 U.S. at 496.

> These arguments would have merited serious consideration if they had been presented properly to the sentencing judge.

445 U.S. at 559.

This Court stated further in *Roberts*, that the Fifth Amendment privilege against compelled self-incrimination is not self-executing and may not be relied upon unless it is invoked in a timely fashion.[17] Ibid.

Here, the appellants brought to the attention of the trial judge in a pretrial motion to dismiss the information and in a memorandum of law that the challenged statute is violative of their constitutional privilege against self-incrimination.

Under the *Roberts* rationale, the meritorious and serious Fifth Amendment claim against self-incrimination has been presented properly and is ripe for decision.[18]

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[17]In this regard the Court opined that if Roberts believed that his failure to cooperate was privileged, he should have said so at a time when the sentencing court could have determined whether his claim was legitimate. Id. at 560.

[18]The Florida Supreme Court attempts to distinguish the *Roberts* decision from the instant case stating:

> Admittedly, a fifth amendment claim was not properly raised in *Roberts* and 'would have merited serious consideration' if it had been. Id. at 559, 100 S.Ct. at 1364. We conclude, however, that for fifth amendment purposes the situation in *Roberts* is distinguishable from that here. A sentence reduction obtained by a sentenced convict due to his cooperation is not tantamount to the enhancement of a sentence imposed on an unsentenced, but convicted

II. Equal Protection of the Law

A serious equal protection flaw to the drug trafficking statute is the statute's discriminatory impact on those who are simply unable to provide "substantial assistance". For example, the convicted defendant in the lowest echelon of a criminal organization would have to serve a mandatory minimum sentence and yet would not have at hand the type of information needed to give the authorities "substantial assistance" that would result in a reduction of sentence.

For it is the so-called "ring leader" or other higherup who will be the person in the best situation to reap the benefits of the subsection, while the person whose involvement in the crime charged is merely peripheral and who is the least blameworthy will be the person most likely to be punished by it.

It is thus apparent that the state is automatically inflicting enhanced penalties upon a defendant whom it presumes has the ability to render "substantial assistance"

(Footnote 18 Continued)

> defendant as a result of his lack of cooperation. The former is no different from a gratuitous sentence reduction offered to one already incarcerated who, even without statutory sanction, risks reincrimination in exchange for early release benefits.

Based on the plain language of the statute and based on the avowed purpose of the Legislature to "rubber hose" persons coming within the purview of the statute into cooperating, it is difficult to understand the reasoning of the Supreme Court of Florida that the sentencing reduction provision in the statute is "gratuitous" in nature.

for mitigation, when the defendant has no ability to deflate the exaggerated punishment, by providing information, as well as no opportunity to explain his inability.

To penalize a convicted defendant who cannot provide "substantial assistance" to law enforcement officers simply because he doesn't possess the knowledge that higherups in that organization would possess denies equal protection of the law contrary to the Fourteenth Amendment.

The Supreme Court of Florida in *Benitez* held that the statute did not deny equal protection of the law since the legislation manifestly passes the rational basis test citing *Hamilton v. State*, 366 So.2d 8 (Fla. 1978).

Although a State need not, in order to meet the requirements of equal protection, provide for abstract symmetry in its legislation, it should mark and set apart the classes and types of problems according to the needs and as dictated or suggested by experience. *Skinner v. Oklahoma*, 316 U.S. 535, 86 L.Ed. 1655, 62 S.Ct. 1110 (1942).

Under the challenged statute the law plays an unequal hand by allowing the least culpable class to be punished more harshly than the class of convicted defendants which choose to cooperate and, as a result of their greater culpability, receive leniency. There is no rational basis for denying the least culpable class the ameliorating effects of Subsection (3). Accordingly, the instant legislation runs afoul of the equal protection clause.

III. Due Process

Vagueness

The statute denies due process of law because the critical term "substantial assistance" is impermissibly vague. The convicted defendant may qualify for a less severe sentence, if and only if, he affords the prosecutor "substantial assistance". If the convicted defendant divulges potentially self-incriminating information to the prosecutor in return for receiving a less severe sentence, the prosecutor may refuse to move the court if he deems the assistance afforded to be less than substantial. If the prosecutor moves the court, the court may refuse to sentence the convicted defendant to a less severe sentence if the court deems the assistance afforded the prosecutor to be less than substantial.[19] In either event, the convicted defendant could not meaningfully contest because the term "substantial assistance" is so vague that it does not afford an ascertainable standard by which a decision of the prosecutor or judge could be reviewed. *Cf., Papachristou v. City of Jacksonville,* 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972).

The principle is not limited to constitutional review of substantive criminal statutes. Where a sentencing statute does not provide ascertainable standards and thus may be applied in a discriminatory and capricious fashion it fails to afford due process of law. *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

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[19]In addition, the arresting agency under Subsection (3) shall be given an opportunity to be heard in aggravation or mitigation in reference to any motion to reduce or suspend the sentence.

Unreviewable Discretion of Prosecutor

Under Subsection (3), the prosecutor is given plenary power to determine what constitutes "substantial assistance" in order to elect whether he should move the court for a reduction or suspension of sentence. Subsection (3) provides no standards or guidelines as to what factual basis will satisfy the statutory requirement of "substantial assistance".

Inherent in a prosecutor's discretion in deciding whether to file a motion for mitigation is the prosecutor's role in making substantive findings of fact as to whether "substantial assistance" has been rendered. Where a finding of fact is made in the post-conviction context and where the finding affects a "liberty interest", due process requires at least the opportunity for a hearing. *See Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); *Specht v. Patterson*, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967); *cf., Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967).

IV. Cruel and Unusual Punishment

In addition to the constitutional shortcomings of the statute pointed out, *supra*, the statute, in effect, creates a crime, where a convicted defendant asserts his privilege against self-incrimination, by establishing severe mandatory minimum terms of incarceration upon the convicted defendant who chooses to remain silent. For the statute penalizes only those persons who refuse to render "substantial assistance", notwithstanding that the person may have a valid Fifth Amendment claim against self-incrimination.

Subsection (3) is not a "gratuitous sentence reduction" as stated by the Florida Supreme Court in *Benitez* (395 So.2d at 520). This "substantial assistance" provision represents a novel "technique" outside the bounds of traditional penalties and thus "is constitutionally suspect". *Cf., Trop v. Dulles*, 356 U.S. 86, 100, 2 L.Ed.2d 630, 78 S.Ct. 590 (1958).

It is apparent that this novel technique of punishing those who refuse to cooperate notwithstanding valid Fifth Amendment claims seeks to accomplish an illegitimate governmental purpose, viz., a statutory scheme to coerce incriminating information from convicted defendants without any coextensive offer of immunity.

A reprehensible aspect of the statute's sentencing scheme is its disproportionate infliction of punishment upon defendants who simply cannot become informants due to lack of any knowledge to provide "substantial assistance". *But see Rummel v. Estelle*, 445 U.S. 263, 63 L.Ed.2d 382, 100 S.Ct. 1133 (1980).[20]

Quite simply the mandatory minimum penalties of the trafficking statute are designed to compel a convicted

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[20]Under the statute's sentencing scheme the trial judge is precluded from exercising any discretion in the determination of the sentence. Thus, the trial judge cannot consider the characteristics of the least culpable defendant, oftentimes a first offender, who has no information of value to the prosecution.

Although *Rummel v. Estelle, supra*, has raised considerable doubts as to whether the Eighth Amendment's prohibition against cruel and unusual punishment would invalidate a state's enactment of any sentencing scheme unrelated to the death penalty, the scope of the Eighth Amendment remains to be explored.

defendant to give "substantial assistance" to the state as an informant, rather than to punish the offense of trafficking for which the defendant was convicted.

Based upon the clear legislative intent to compel cooperation from convicted and sentenced defendants Subsection (3), rather than being a "gratuitous sentence reduction", imposes a penalty for failing to cooperate, which penalty constitutes cruel and unusual punishment in contravention of the Eighth Amendment. (395 So.2d at 520).

V. The Fourth Amendment Issue

In *Franks v. Delaware, supra*, this Court held:

> We reverse, and we hold that, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

The affiant officer's testimony at the hearing on the motion to suppress (as well as the testimony of Patrolman Osberg on the scene), establishes by a preponderance of the evidence, that affiant falsely stated, knowingly and intentionally, or with reckless disregard for the truth, that he observed three white males, and that he was aided in his observation with the night scope so that the bales of marijuana were clearly seen (A 68; T 32, 35, 53).

This foregoing false material in the warrant affidavit, should be set to one side. Inasmuch as the remaining content of the affidavit is insufficient to establish probable cause, the search warrant should be voided and the fruits of the search excluded. *Franks v. Delaware, supra.*

The only distinction between the instant case and *Franks v. Delaware, supra,* is that here appellants do not need a hearing as was required in the *Franks* case to support the allegations of reckless disregard for the truth. For the facts adduced at the suppression hearing established the affiant's reckless disregard for the truth by a preponderance of the evidence.

The question is substantial as the judgment of the District Court of Appeal, Fourth District, is directly contrary to the holding in *Franks v. Delaware.* Accordingly, the Court should summarily reverse the judgment of the District Court of Appeal, Fourth District, on this issue.

CONCLUSION

Based on the foregoing reasons and authorities, this Court should note probable jurisdiction and set this case for full briefing and argument.

Respectfully submitted,

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(305) 358-4066

Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that three copies hereof were mailed to Sharon Lee Stedman, Assistant Attorney General for the State of Florida, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401, this 10th day of May, 1982.

RICHARD M. GALE
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(305) 358-4066

Attorney for Appellants

Appendix

[NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DISPOSED OF.]

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT JULY TERM 1981

CASE NO. 80-1635

MARK IZZARD, WAYNE LAMAR KACKLEY, JAMES GILBERT COWHEARD, and JACKSON LOCKARD HOWELL,

Appellants,

vs.

STATE OF FLORIDA,

Appellee.

Decision filed December 16, 1981

Appeal from the Circuit Court for Palm Beach County; Marvin U. Mounts, Jr., Judge.

Richard M. Gale, Miami, for appellants.

Jim Smith, Attorney General, Tallahassee, and Laura R. Morrison, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

AFFIRMED.

BERANEK, J., OWEN, WILLIAM C., JR., (Retired), and GREEN, OLIVER L., JR., Associate Judges, concur.

STATE of Florida,

Appellant,

v.

Carlos M. BENITEZ and Esperanza Benitez,

Appellees.

No. 57834.

Supreme Court of Florida.

Feb. 12, 1981.

Rehearing Denied April 13, 1981.

Jim Smith, Atty. Gen., and Calvin L. Fox, Asst. Atty. Gen., Miami, and Janet Reno, State Atty., and Arthur Joel Berger, Asst. State Atty., Miami, for appellant.

Joseph Beeler, and Brian Richard McComb, Miami, for appellees.

Philip Carlton, Jr. of the Law Offices of Philip Carlton, Jr., Miami, for Daniel Cowgill, amicus curiae.

ENGLAND, Justice.

This case comes to us on direct appeal from a trial court order determining that section 893.135, Florida Statutes (1979)—Florida's newly-enacted "drug trafficking" statute—is unconstitutional.

After Carlos and Esperanza Benitez attempted to sell one kilo of cocaine to undercover narcotics agents for $44,000, they were charged by information with "trafficking in cocaine" in violation of section 893.135. In ruling on motions to dismiss the charges, the trial court entered a lengthy order declaring section 893.135 to be facially invalid on a multiplicity of grounds. The state appeals that order, urging error in each of the trial court's rulings.

Section 893.135 is a unique response to a serious and growing concern of the legislature regarding illegal drug activities in the State of Florida. Subsection (1) of the new law establishes severe mandatory minimum sentences for trafficking in various types of illegal drugs. Subsection (2) prevents the trial court from suspending, deferring or withholding the adjudication of guilt or the imposition of sentence on a person convicted under the law, and it eliminates the defendant's eligibility for parole during the minimum mandatory sentence. Subsection (3) provides an "escape valve" from the statute's rigors, based on the initiative of the prosecuting attorney, by permitting the court to reduce or suspend a sentence if a convicted defendant is willing to cooperate with law enforcement authorities in the detection or apprehension of others involved in drug trafficking.

Section 893.135 was enacted to assist law enforcement authorities in the investigation and prosecution of illegal drug trafficking at all levels of distribution, from the importer-organizer down to the "pusher" on the street. The harsh mandatory penalties of subsection (1), ameliorated by the prospect of leniency in subsection (3), were clearly calculated to provide a strong incentive for drug violators to cooperate with law enforcement

authorities and become informers. No one argues that the elimination of illegal drug traffic is not a beneficial and worthwhile goal, or that the goals of this legislation are not meritorious.

Nonetheless, in their zeal to combat the flow and distribution of illegal drugs through this novel legislation, legislators knowingly glossed over alleged constitutional defects in the approach that was being developed. We in the judiciary do not have that luxury. Indeed, the trial judge's extensive and detailed order exhibits the multiple, serious difficulties which this statute poses under well-established constitutional principles. We discern six major challenges to the constitutionality of section 893.135, one directed at the mandatory penalties and five directed at the escape valve in subsection (3). The state also half-heartedly challenges the appellees' standing for the first time on this appeal. This last challenge being the easiest to treat, we discuss it first.

1. *Standing.*

[1] The basic rule governing the standing of parties challenging statutory enactments was recently stated in *Sandstrom v. Leader*, 370 So.2d 3, 4 (Fla.1979):

> Fundamental constitutional principles dictate that one may not challenge those portions of an enactment which do not adversely affect his personal or property rights. . . Such a personal stake in the outcome of the controversy is necessary "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for

illumination of difficult constitutional questions[.]' (citations omitted).

The state argues that, because appellees have not yet been convicted, they have no personal stake in this penalty-oriented statute.

To state the assertion is to demonstrate its absurdity. A party subject to criminal prosecution clearly has a sufficient personal stake in the penalty which the offense carries. This is wholly unlike cases in which criminal defendants have challenged portions of a statute which have nothing to do with their prosecution. *See State v. Millington*, 377 So.2d 685 (Fla.1979); *State v. Champe*, 373 So.2d 874 (Fla.1978).

2. *Cruel and Unusual Punishment*

[2] Appellees argue that the mandatory minimum sentences of section 893.135(1) violate the cruel and unusual punishment clauses of the state[1] and federal[2] constitutions. Relying on various death penalty decisions of the United States Supreme Court,[3] they first contend that the mandatory minimum sentences unconstitutionally eliminate the exercise of discretion in sentencing. This

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[1]Art. 1, § 17, Fla.Const.

[2]U.S.Const. amend. VIII.

[3]*Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).

argument was rejected by this Court in *McArthur v. State*, 351 So.2d 972 (Fla.1977), and warrants no further discussion here.

[3, 4] Appellees also argue that the mandatory sentences in section 893.135 constitute cruel and unusual punishment since they are unnecessarily severe and disproportional to the nature of the crime. This Court has consistently upheld minimum mandatory sentences, regardless of their severity, against constitutional attacks arguing cruel and unusual punishment. *See, e. g., McArthur v. State*, 351 So.2d 972 (Fla.1977); *Banks v. State*, 342 So.2d 469 (Fla.1976); *O'Donnell v. State*, 326 So.2d 4 (Fla.1975). The dominant theme which runs through these decisions is that the legislature, and not the judiciary, determines maximum and minimum penalties for violations of the law. While it is often said that in an extreme case—wherein the sentence was *grossly* disproportionate to the severity of the crime—the legislature's judgment would run afoul of the constitutional prohibition, this Court has never addressed such a situation in the context of statutory sentencing minima.

The recent decision of the United States Supreme Court in *Rummel v. Estelle*, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980), indicates that similar considerations prevail under the federal constitution. In that case, the Court held that a mandatory life sentence imposed on the petitioner pursuant to a Texas recidivist statute did not constitute cruel and unusual

punishment under the eighth amendment. The majority's analysis of this area noted that:

> [t]his Court has on occasion stated that the Eighth Amendment prohibits imposition of a sentence which is grossly disproportionate to the severity of the crime. . . . In recent years this proposition has appeared most frequently in opinions dealing with the death penalty. . . . Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishment to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to Rummel.
>
> Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.

Id., 445 U.S. at 271, 100 S.Ct. at 1138 (citations omitted). After analyzing one of these rare successful challenges, *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910), the majority concluded:

> Given the unique nature of the punishments considered in *Weems* and in the death-penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually

imposed is purely a matter of legislative prerogative.

Id., 445 U.S. at 273, 100 S.Ct. at 1139 (footnote omitted).

The penalties imposed by section 893.135 are certainly severe, but they are by no means cruel and unusual in light of their potential deterrent value and the seriousness of the crime involved. *See McArthur v. State; O'Donnell v. State; accord, People v. Broadie*, 37 N.Y.2d 100, 371 N.Y.S.2d 471, 332 N.E.2d 338, *cert. denied*, 423 U.S. 950, 96 S.Ct. 372, 46 L.Ed.2d 287 (1975).

3. *Due Process-Vagueness*

[5, 6] Little discussion is needed concerning appellees' suggestion that subsection (3) is impermissibly vague in defining a convicted defendant who is eligible for lenient treatment as "any person . . . who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals." Being a description of a *post-conviction* form of plea bargaining rather than a definition of the crime itself, the phrase "substantial assistance" can tolerate subjectivity to an extent which normally would be impermissible for penal statutes. *Cf. Linville v. State*, 359 So.2d 450 (Fla.1978) (statutory definition of proscribed activity held unconstitutionally vague). The contested phrase, in any event, is susceptible of common understanding in the context of the whole statute. *Schultz v. State*, 361 So.2d 416 (Fla.1978). There is no due process infirmity.

4. *Equal Protection*

[7] Appellees' suggestion that subsection (3) denies equal protection of the law to convicted defendants who cannot provide "substantial assistance" to law enforcement officials is patently without merit. This legislation manifestly passes the rational basis test. *See Hamilton v. State*, 366 So.2d 8 (Fla.1978).

5. *Separation of Powers*

[8] Two basic arguments by appellees are directed at Florida's constitutional separation of governmental powers. Art. II, §3, Fla.Const. First, they assert that subsection (3) encroaches on the Court's rulemaking role, Art. V, § 2(a), Fla.Const., in that it conflicts with Rule 3.800(b), Rule 3.720(b), and Rule 3.171 of the Florida Rules of Criminal Procedure. The statute differs from these rules, of course, but it in no way so conflicts with them as to offend the constitution.

[9-11] Rule 3.800(b) permits the reduction of legal sentences, yet since it specifically excludes minimum mandatory sentences from its operation, its procedures obviously are not incompatible with section 893.135. Likewise, Rules 3.720(b) and 3.171 do not pose any obstacle to the operation of section 893.135. Rule 3.720(b) provides that at a sentencing hearing, the court shall "[e]ntertain submissions and evidence by the parties which are relevant to the sentence. . . ." Subsection (3) states that "[t]he arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any [motion for reduction or suspension of sentence]." The statute does not explicitly exclude the defendant from submitting evidence in his behalf, and

it does not offend the statutory scheme to afford him that right. Finally, applicable procedural safeguards in Rule 3.171 can be afforded to defendants, to the extent they do not conflict with the explicit language of subsection (3). No infirmity of constitutional dimension attends the omission of those that do.

[12] Appellees' second argument premised on the constitutional separation of powers is that subsection (3) usurps the sentencing function from the judiciary and assigns it to the executive branch, since the benefits of subsection (3) are triggered by the initiative of the state attorney. Under the statute, the ultimate decision on sentencing resides with the judge who must rule on the motion for reduction or suspension of sentence. "So long as a statute does not wrest from courts the *final* discretion to impose sentence, it does not infringe upon the constitutional division of responsibilities." *People v. Eason*, 40 N.Y.2d 297, 301, 386 N.Y.S.2d 673, 676, 353 N.E.2d 587, 589 (1976) (emphasis in original) (rejecting a separation of powers attack on a similar provision in New York's drug laws).

6. *Self-incrimination*

[13, 14] Finally, the appellees argue that section 893.135 coerces a defendant into relinquishing his fifth amendment privilege against self-incrimination by denying him sentencing leniency unless he cooperates with the authorities. We reject this argument, primarily because it depends on unwarranted assumptions about the nature of the informer's disclosures. Nothing in the statute suggests that "substantial assistance" must incriminate the defendant of crimes other than those for which he has already been convicted (and for which no fifth

amendment privilege is obviously necessary). We acknowledge the risk of prosecution in other jurisdictions. Nonetheless, a defendant need not invoke subsection (3), as nothing in the statute is compulsive. Putting a defendant to a difficult choice is not necessarily forbidden by the fifth amendment. *See, e. g., Corbitt v. New Jersey*, 439 U.S. 212, 218, 99 S.Ct. 492, 497, 58 L.Ed.2d 466 (1978) ("[N]ot every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid." (footnote omitted)); *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978); *McGautha v. California*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971). No constitutional deprivation results if a defendant elects to reap the benefits of subsection (3).

[15] With respect to those cases which say that the trial courts may not enhance a sentence based on a defendant's failure to cooperate with the authorities, *see United States v. Garcia*, 544 F.2d 681 (3rd Cir. 1976); *United States v. Acosta*, 501 F.2d 1330 (5th Cir. 1974) (Gee, J., dissenting), *adopted en banc*, 509 F.2d 539 (5th Cir.), *cert. denied*, 423 U.S. 891, 96 S.Ct. 188, 46 L.Ed.2d 122 (1975); *United States v. Rogers*, 504 F.2d 1079 (5th Cir. 1974), *cert. denied*, 422 U.S. 1042, 95 S.Ct. 2655, 45 L.Ed.2d 693 (1975), we believe that *Roberts v. United States*, 445 U.S. 552, 100 S.Ct. 1358, 63 L.Ed.2d 622 (1980), went a long way toward resolving this issue against appellees. The Court in *Roberts* concluded that the district court properly considered the defendant's refusal to cooperate as one factor in imposing consecutive sentences. Admittedly, a fifth amendment claim was not properly raised in *Roberts* and "would have merited serious consideration" if it had been. *Id.* at 559, 100 S.Ct. at 1364. We conclude, however, that for fifth

amendment purposes the situation in *Roberts* is distinguishable from that here. A sentence reduction obtained by a sentenced convict due to his cooperation is not tantamount to the enhancement of a sentence imposed on an unsentenced, but convicted defendant as a result of his lack of cooperation. The former is no different from a gratuitous sentence reduction offered to one already incarcerated who, even without statutory sanction, risks reincrimination in exchange for early release benefits.

Our disposition of appellees' challenges obviates the need to consider the severability of subsection (3) from the statute. We hold that section 893.135 is constitutional. The order of the trial court is reversed, and the case is remanded for further proceedings.

SUNDBERG, C. J., and ADKINS, BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur.

IN THE DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA FOURTH DISTRICT

CASE NO. 80-1653

MARK IZZARD, WAYNE LAMAR KACKLEY,
JAMES GILBERT COWHEARD and
JACKSON LOCKARD HOWELL,
Appellant,

v.

STATE OF FLORIDA
Appellee.

February 10, 1982

BY ORDER OF THE COURT:

ORDERED that the Motion for Rehearing filed by Appellants on December 30, 1981 is hereby denied.

I hereby certify the foregoing is a true copy of the original court order.

/s/ Clyde L. Heath
CLYDE L. HEATH,
CLERK.

cc: Richard M. Gale, Attorney
Sharon Lee Stedman, Assistant Attorney General

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, FOURTH DISTRICT

CASE NO. 80-1635
Circuit Court Case No. 79-2580 CF

MARK IZZARD, WAYNE LAMAR KACKLEY,
JAMES GILBERT COWHEARD, and
JACKSON LOCKARD HOWELL,
Appellants,

vs.

STATE OF FLORIDA.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Mark Izzard, Wayne Lamar Kackley, James Gilbert Cowheard, and Jackson Lockard Howell, appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the District Court of Appeal of Florida, Fourth District, affirming the judgment of conviction entered herein on December 16, 1981. A timely petition for rehearing was denied on February 10, 1982.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

RICHARD M. GALE
924 Biscayne Building
19 West Flagler Street
Miami, Florida 33130
Tel: 358-4066

/s/ Richard M. Gale
Attorney for Appellants

Filed May 3, 1982

I hereby certify that a copy hereof was mailed to Sharon Lee Stedman, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401-5295, this 30th day of April, 1982.

/s/ Richard M. Gale

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, CRIMINAL DIVISION, IN AND FOR PALM BEACH COUNTY, STATE OF FLORIDA

SPRING Term, in the year of our Lord, one thousand nine hundred and SEVENTY NINE

AMENDED
INFORMATION FOR
TRAFFICKING IN MARIJUANA

STATE OF FLORIDA

vs.

MARK WILLIAM IZZARD,
WAYNE LAMAR KACKLEY,
JAMES GILBERT COWHEARD, JR., and
JACKSON LOCKARD HOWELL

In the Name and by Authority of the State of Florida:

JEROME DAVIS Assistant State's Attorney of the Fifteenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Palm Beach, under oath information makes that MARK WILLIAM IZZARD, WAYNE LAMAR KACKLEY, JAMES GILBERT COWHEARD, JR., and JACKSON LOCKARD HOWELL in the County of Palm Beach and State of Florida, on the 3rd day of JULY in the year of our Lord, one thousand nine hundred and SEVENTY NINE in the County and State aforesaid, did knowingly sell, manufacture, deliver, or bring into the State of Florida or was in knowing actual or constructive

possession of Cannabis, commonly known as Marijuana in the amount of an excess of 2,000 pounds, but less than 10,000 pounds, contrary to Florida Statute 893.135(1)(a)(2),

JD/bjm

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR PALM BEACH COUNTY

CRIMINAL DIVISION

CASE NO. 79-2580 CF-Mounts

STATE OF FLORIDA

vs.

MARK W. IZZARD, WAYNE L. KACKLEY, JAMES G. COWHEARD and JACKSON L. HOWELL,

Defendants.

ORDER

This matter was before the Court on Motions Monday, November 26, 1979. Defendants Cowheard and Kackley were represented by Attorney Masin, Defendant Izzard was represented by Attorney Rosen and Defendant Howell was represented by Attorney Podsaid and the State was represented by Assistant State Attorney Jerome Davis. The defendants have raised the question of the constitutionality of the new Florida Statute relating to Trafficking in Drugs, F.S. 893.135. The Court denies their Motions to Dismiss. I have supplied counsel with a copy of my order entered in two other cases, which order is incorporated as the Order in this case.

Order Incorporated By Reference

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR PALM BEACH COUNTY

CRIMINAL DIVISION

CASE NO. 79-1462 CF

CASE NO. 79-4318 CF

STATE OF FLORIDA

vs.

PHILLIP REID ELMORE and
MAURICE R. McCOY
JAMES BRADLEY PARKS,
Defendants.

ORDER

This Order covers two cases in which the Constitutionality of Section 893.135, Florida Statutes 1979 is questioned. Because I think it likely that the Supreme Court of our State will have ruled on this question prior to these cases becoming ripe for trial, I am omitting citation of authority. Should these orders be questioned by counsel and should an appeal become imminent in any case, I will supply authority, if requested by the attorneys.

The pivotal language of sub-paragraph (3) is as follows:

> "The State Attorney *may* move the sentencing court . . . . The arresting agency *shall* be given an opportunity to be heard . . . . The Judge hearing the action *may* reduce or suspend the sentence . . . ."
> (Emphasis added.)

It is quite clear that the Judge is not required to reduce or suspend the sentence. His discretion remains unfettered by the action of the State Attorney or the arresting agency. That the drafters knew what they were doing is made even more apparent by the emphasized language.

The cases cited by the various defendants and in several of the trial court orders all concern instances where the Judge, *himself*, requires the defendant to speak. There the personal intervention of the Court requires the defendant to infringe his rights not to

incriminate himself. The Judge is not involved in such a thing under this statute and remains free to impose the mandatory minimum sentence no matter what the substantial assistance might be.

The second major thrust of the constitutionality attack is related to the crual and unusual punishment argument. Without being sarcastic, I cannot find that this statute creates a cruel and unusual punishment. Harsh and Draconian it may be. The Legislature has the right and duty to reflect the will of what the people think the punishments should be for a particular crime. It is not cruel for one crime to carry a more severe penalty than another. Neither is it unusual for one crime to carry a harsher penalty than another.

Finally, the statute in no way requires the defendant to furnish evidence to the State. Just as has always been the case prior to the enactment of this statute, a defendant is free to negotiate such disclosures to the State and to hope that the State will speak in his or her behalf at sentencing. Nothing compels him to provide substantial assistance.

ACCORDINGLY, the Statute is Constitutional in all respects.

The Motions are denied.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida this 13th day of November, 1979.

/s/ Marvin Mounts, Jr.

MARVIN MOUNTS, JR.,
Circuit Judge

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR PALM BEACH COUNTY

CRIMINAL DIVISION

CASE NO. 79-2580 CF-Mounts

STATE OF FLORIDA

vs.

MARK W. IZZARD,
WAYNE L. KACKLEY,
JAMES G. COWHEARD and
JACKSON L. HOWELL,

Defendants.

ORDER

This matter was before the Court on Motions Monday, November 26, 1979. Defendants Cowheard and Kackley were represented by Attorney Masin, Defendant Izzard was represented by Attorney Rosen and Defendant Howell was represented by Attorney Podsaid and the State was represented by Assistant State Attorney Jerome Davis. The defendants have raised the question of the constitutionality of the new Florida Statute relating to Trafficking in Drugs, F.S. 893.135. The Court denies their Motions to Dismiss. I have supplied counsel with a copy of my order entered in two other cases, which order is incorporated as the Order in this case.

The Motion to Suppress is directed at a search warrant issued for a dwelling. A second search warrant for a vessel was obtained after the execution of the first search warrant for the residence. All attorneys agree that if the first warrant was legally sufficient, the second warrant is as well. If the Court's ruling is that the first warrant was insufficient, the second warrant is so related to the first, that it also must fall.

The facts are that the Boca Raton Police Department received a report of suspected criminal activities regarding a vessel docked near a residence on Marine Drive in Boca Raton and further activities concerning the operation of a van and the activities of two white males. It is clear that the report was no more than a suspicion, but it was serious enough for a citizen to call the police.

The affiant began his surveillance of the house and the vessel docked at the house at 9:00 p.m. A few minutes later the affiant observed the arrival of a van and stated his belief that it pulled into the garage of the residence. At 11:30 p.m. the affiant was joined by another police officer. At 1:00 a.m. the officers observed three persons in dark clothing carry off of the vessel fifteen large bales into the west door of the residence. The affiant states at three points in the application for the warrant that he is familiar with such bales or packages:

> "On at least ten (10) previous occasions, your affiant has observed package bales of marijuana."

". . . were observed . . . to off load at least fifteen (15) large bales of what your affiant has observed on previous occasions to be marijuana."

". . . bales of marijuana were clearly seen by your affiant."

The officer further relates in his application that he knows from previous occasions that persons use waterfront houses, whose canals provide direct access to the Intracoastal Waterway and the Atlantic Ocean. He continues that he knows from previous experience that such persons often utilize a garage for the loading of vehicles, particularly vans, with large quantities of marijuana without being seen from the outside.

In *State v. Profera*, 239 So.2d 867 (4th DCA 1970), a case sometimes referred to as the "Bull Durham Case", Judge Walden pointed out, in quoting from another case:

"The test of probable cause is not what reaction victims—*or judges*—might have but what the totality of the circumstances means to police officers. Conduct innocent in the eyes of the untrained may carry entirely different 'messages' to the experienced or trained observer." *Profera* at 869.

There is an excellent discussion of this trained sensitivity by Charles E. Silberman in his book, *Criminal Violence*,

Criminal Justice. He states at page 211 of the Chapter entitled "what the Police Do—and Don't do":

> "In any case, most police do not just stop people at random; much of the artistry of police work lies in the personal radars police develop to tell them who is and who is not worth stopping. Criminals, after all, do not carry billboards announcing their occupation: they are likely to avoid face-to-face contact with the police wherever possible."

The simple question emerges as this: When two officers testify that they saw people removing specifically shaped bales or packages from a boat to a house early in the morning; and then they also testify that they are familiar with such bales from having seen them before and that they are known to contain marijuana, even though they cannot see the marijuana inside of these bales, is that sufficient reason to authorize the search warrant? In Hernandez v. State, 369 So.2d 76 (3rd DCA) the officers were confronted with similar facts. An unidentified person reported several men unloading bales from a boat at night. The officers went to an area near the boat and observed packaged marijuana on a loading platfrom of a nearby truck. They had to cut open one bale to find what they then recognized to be marijuana. The Court found that was sufficient probable cause to search the area and the truck. In this case, the officers went to the additional step of obtaining a search warrant from a judge.

While it is true that in this hearing, the officers testified that they could not identify the persons carrying the bales, their testimony is quite clear that they

recognized the shape of the bales and knew that they were the kind that contained marijuana. This testimony was based on prior police experience.

In Agnew v. State, 376 So.2d 13 (2nd DCA 1979) the Court states:

> "Captain Higdon arrived and the two officers looked through the door and observed brown burlap bags. Sloan testified that he believed the sacks contained contraband, but at the time he could not be certain. There were no markings on the bags and they emitted no particular odor. Sloan turned to Higdon and said 'I think we've got the jackpot, but I don't think we've go anybody inside the plane.' . . . The bale of of marijuana found in the hanger leased by Gostomski was in plain view of the officers and therefore was clearly admissible against him." *Agnew* at 14 and 16.

I think it is reasonable to conclude from this case that the Court is acknowledging that if you see a bale or large package in circumstances which can only point to a smuggling operation, it is reasonable and proper to conclude that those bales contain marijuana. To similar effect is the holding in Adams v. State, 375 So.2d 638 (1st DCA 1979). The syllabus summarizes the decision to the effect that an officer who observed half of a plastic baggie containing a number of small hand rolled cigarettes protruding from a defendant's sweater pouch had probable cause to believe that the offense was being committed in his presence justifying a warrantless arrest and the seizure of the cigarettes, even though the officers had not actually seen the marijuana before forming the

reason to believe that the defendant was in possession of marijuana.

I find that seeking a search warrant here was properly what the police should have done and that the magistrate correctly determined that this was sufficient probable cause. As I have pointed out before, in other similar rulings, one can almost take judicial knowledge of the fact that Florida is the locus of large scale smuggling activities. We read about it in the newspapers on a regular basis and I have even had one local reporter tell me that his paper does not carry stories unless the seizure is above a certain poundage or quantity.

The Motion to Suppress is denied.

DONE AND ORDERED at West Palm Beach County, Florida this 21st day of December, 1979.

/s/ Marvin Mounts, Jr.

MARVIN MOUNTS, JR.,
Circuit Judge

Copies furnished counsel

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV

Searches and seizures

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VIII.

Excessive bail, fines, punishments

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV

§1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§893.135 Trafficking; mandatory sentences; suspension or reduction of sentences

(1) Except as authorized in this chapter or in chapter 500 and notwithstanding the provisions of s. 893.13:

(a) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, in excess of 100 pounds of cannabis is guilty of a felony of the first degree, which felony shall be known as "trafficking in cannabis." If the quantity of cannabis involved:

1. Is in excess of 100 pounds, but less than 2,000 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $25,000.

2. Is 2,000 pounds or more, but less than 10,000 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of 5 calendar years and to pay a fine of $50,000.

3. Is 10,000 pounds or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and to pay a fine of $200,000.

(b) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine as described in s. 893.03(2)(a)4. or of any mixture containing cocaine is guilty of a felony of

the first degree, which felony shall be known as "trafficking in cocaine." If the quantity involved:

1. Is 28 grams or more, but less than 200 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $50,000.

2. Is 200 grams or more, but less than 400 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 5 calendar years and to pay a fine of $100,000.

3. Is 400 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and to pay a fine of $250,000.

(c) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 4 grams or more of any morphine, opium, or any salt, isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b) or (2)(a), or 4 grams or more of any mixture containing any such substance, is guilty of a felony of the first degree, which felony shall be known as "trafficking in illegal drugs." If the quantity involved:

1. Is 4 grams or more, but less than 14 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $50,000.

2. Is 14 grams or more, but less than 28 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 10 calendar years and to pay a fine of $100,000.

3. Is 28 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 25 calendar years and to pay a fine of $500,000.

(d) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of phencyclidine or of any mixture containing phencyclidine, as described in s. 893.03(2)(b), is guilty of a felony of the first degree, which felony shall be known as "trafficking in phencyclidine." If the quantity involved:

1. Is 28 grams or more, but less than 200 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $50,000.

2. Is 200 grams or more, but less than 400 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 5 calendar years and to pay a fine of $100,000.

3. Is 400 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and to pay a fine of $250,000.

(e) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 200 grams or more of methaqualone or of any mixture containing methaqualone, as described in s. 893.03(2)(c), is guilty of a felony of the first degree, which felony shall be known as "trafficking in methaqualone." If the quantity involved:

1. Is 200 grams or more, but less than 5 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $50,000.

2. Is 5 kilograms or more, but less than 25 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 5 calendar years and to pay a fine of $100,000.

3. Is 25 kilograms or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and to pay a fine of $250,000.

(2) Nothwithstanding the provisions of s. 948.01, with respect to any person who is found to have violated this section, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall such person be eligible for parole prior to serving the mandatory minimum term of imprisonment prescribed by this section.

(3) The state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if he finds that the defendant rendered such substantial assistance.

[FILED 1979 AUG – 2]
IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CRIMINAL DIVISION

CASE NO. 79-2580-CF-A02,B02,C02 & D02

STATE OF FLORIDA,

Plaintiff,

vs.

MARK IZZARD, WAYNE LAMAR KACKLEY,
JAMES GILBERT COWHEARD, and
JACKSON LOCKARD HOWELL,

Defendants.

MOTION TO DISMISS THE INFORMATION

Defendants, MARK IZZARD, WAYNE LAMAR KACKLEY, JAMES GILBERT COWHEARD and JACKSON LOCKARD HOWELL, respectfully move this Court, pursuant to Rule 3.191(b), of the Florida Rules of Criminal Procedure, to dismiss the Information and all charges against them.

In support of their motion, Defendants state as follows:

1. The Information is founded upon an invalid and unconstitutional statute in that the first degree

felony status and the mandatory minimum sentence provisions of §893.135 are entirely disproportionate to the severity and blameworthiness of the crime when applied to cannabis offenses and to the facts of the Defendants' case and are entirely disproportionate to any deterrent effect, penological goal or other valid social purpose justifying the sanctions and, further, are unreasonable and arbitrary since they impose these sanctions without consideration of the individual defendant's degree of culpability in the offense, so that the Information imposes excessive cruel and unusual punishment and deny due process of law, as well as other basic rights, especially as applied in the instant case, all in violation of Article I,§§ 2,4,9 and 17, of the Constitution of the State of Florida, and the First, Eighth and Fourteenth Amendments to the United States Constitution.

2. The Information is founded upon an unconstitutionally vague, indefinite, uncertain, overbroad and arbitrary statute, to wit, §893.135, Florida Statutes, including but not limited to the provisions of sub-sections (2) and (3) thereof which condition liberty upon the following terms:

(a) that the state attorney "may" move the sentencing court to reduce or suspend sentences without any standards or guidelines for the exercise of such discretion;

(b) that the state attorney's motion be made only in connection with a defendant who provides "substantial assistance" in the investigation and prosecution of others;

(c) that the judge "may" reduce or suspend a sentence without standards or guidelines for the exercise of such discretion;

(d) that the judge find that the defendant rendered "substantial assistance" in the investigation and prosecution of others; and

(e) that the benefits are available only to defendants who have accomplices, accessories, co-conspirators or principals in the crime and only when the state attorney requires, and the defendant is capable of rendering substantial assistance in their identification, arrest and conviction; all in violation of Article I, §§ 1,2,4,5 and 9, of the Constitution of the State of Florida, and of the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

3. Moreover, and more particularly, the potential, for arbitrary, punitive and/or discriminatory application in the reduction and suspension of sentences and in the choice of sanctions by proceeding either under §893.135 with its draconian penalties or only under the less severe and more humane and reasonable provisions of §893.13(1) in the prosecution of the same behavior, also constitutes a denial, of due process and equal protection of the laws, all in violation of Article I, §§ 2, 4, 9 and 17, of the Constitution of the State of Florida and of the First, Eighth and Fourteenth Amendments to the United States Constitution.

4. The application of the "Trafficking in Cannabis" first degree felony provisions, i.e., §893.135, Florida Statutes, in this case constitutes selective and discriminatory prosecution of the defendants who have

been invidiously singled out of a large class of violators in derogation of their rights to freedom of speech and press and to equal protection of the laws as guaranteed by Article I, §§ 1, 2, 4 and 9 of the Constitution of the State of Florida, and of the First, Ninth and Fourteenth Amendments to the United States Constitution.

5. The Information is founded upon an invalid and unconstitutional statute in that §893.135, Florida Statutes, prescribes a severe mandatory minimum sentence without parole or other mitigation unless the defendant provides "substantial assistance" in the investigation or prosecution of others, thus conditioning the grant of a substantial benefit upon the relinquishment of the Defendants' right to remain silent and penalizing him for the exercise of that constitutional right, all in violation of the privilege against self-incrimination protected by Article I, §9 of the Constitution of the State of Florida and by the Fifth and Fourteenth Amendments to the United States Constitution, contrary to our accusatorial, as opposed to inquisitional, system of justice which is implicit in our traditions and organic law, denying the defendants due process of law guaranteed by Article I, §9 of the Constitution of the State of Florida and by the Fourteenth Amendment to the United States Constitution and invading the inherent and basic rights of the People contrary to Article I, §§ 1, 2, 4, 5 and 12 of the Constitution of the State of Florida and the First, Fourth, Ninth and Fourteenth Amendments to the United States Constitution.

6. The Information is founded upon an invalid and unconstitutional statute in that §893.135, Florida Statutes, essentially enacts a new offense of failing to inform against fellow citizens and other persons, all in

violation of the rights set forth in Item 5 immediately above and contrary to basic precepts of a free society.

7. The Information is founded upon an invalid and unconstitutional statute in that §893.135, Florida Statutes, prescribes a severe mandatory minumum sentence without parole or other mitigation unless the defendant cooperates to the satisfaction of the state attorney and/or the sentencing judge, and therefore, inherently and necessarily infringes upon the defendants' basic constitutional right to have the accusations against them proved by the State to the satisfaction of a jury, all in violation of the basic rights of the accused guaranteed by Article I, §§ 2, 9, 16, 17, 21 and 22 of the Constitution of the State of Florida and of the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution.

8. The Information is founded upon an invalid and unconstitutional statute in that §893.135, Florida Statutes, prescribes mandatory minimum sentences without parole or other mitigation unless the state attorney initiates a motion to reduce or suspend the sentence and, further, in that the state attorney is vested with unbounded discretion to initiate prosecution for the same conduct but under §893.13(1)(a)(2), Florida Statutes, without charging in excess of 100 pounds of canabis, and thus not involving the mandatory penalty provisions, thereby violating basic constitutional principles of division and separation of executive, legislative and judicial powers and responsibilities and contrary to the guarantee of a Republican form of government, all decreed by the Constitution of the State of Florida and by Article IV, Section 4 of the United States Constitution.

9. The Information is founded upon an invalid and unconstitutional statute in that §893.135(1)(a), Florida Statutes, makes it a serious felony to knowingly sell, manufacture, deliver or be in actual or constructive possession of various stated quantities of cannabis unless specifically authorized, said statute thus failing to require willful, deliberate, intentional, purposeful, voluntary or wrongful behavior on the part of the accused and/or failing to require a specific intent on the part of the accused to do something which the law forbids and, further said statute thus permitting the accused to be convicted without *mens rea* and even on account of involuntary status, all denying due process, constituting cruel and unusual punishment and unjustifiably invading the inherent and basic rights of the People in violation of Article I, §§ 1, 2, 9 and 17 of the Constitution of the State of Florida and of the Eighth, Ninth and Fourteenth Amendments to the United States Constitution.

10. The Information fails to state an offense and to allege the following essential elements of §893.13(1)(a), Florida Statutes, which defines the offense punished in §893.135, Florida Statutes, and which require:

(a) that the defendant possess the controlled substance (whether in actual or constructive possession) "with intent to sell, manufacture, or deliver" it;

(b) by implication, that the defendant sell, manufacture or deliver or possess the controlled substance with some criminal intent (*mens rea*), whether "willfully", "intentionally",

"deliberately", "maliciously", or by any other name or description; and

(c) that the defendant act "unlawfully".

11. The Information fails to identify the offenses charged with sufficient particularity to enable the Defendants to prepare and present their defenses, in violation of their rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16, and 22, of the Constitution of the State of Florida.

12. The Information fails to identify the offenses charged with sufficient particularity to enable a trial court to know whether the defendants will be tried on the same charge as sworn to by the prosecuting officer of the Court in filing the Information and as passed on by any neutral and detached magistrate in determining probable cause, in violation of the Defendants rights to a fair accusation process as guaranteed by the Fourth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, Sections 2, 9, 14, 15(a) and 16 of the Constitution of the State of Florida and Rules 3.130, 3.131 and 3.140 of the Florida Rules of Criminal Procedure.

13. The Information fails to identify the offense charged with sufficient particularity to enable the Defendants to plead a judgment of conviction or acquittal under this Information as a bar to a subsequent prosecution for the same offense, in violation of their right against being twice in jeopardy for the same offense as guaranteed by the Fifth, and Fourteenth Amendments to the United States Constitution and

Article I, Section 10, of the Constitution of the State of Florida.

14. The Information is so vague, indefinite, uncertain, and overbroad as to deprive the Defendants of the notice to which they are entitled under the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 2, 4 and 9 of the Constitution of the State of Florida.

15. The Information is so vague, indefinite, uncertain, and overbroad that it prevents Defendants from enjoying the effective assistance of counsel to which they are entitled under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Constitution of the State of Florida.

16. The Information fails to state facts sufficient to constitute an offense against the State of Florida.

17. The Information fails to allege all of the essential elements of the offense purportedly charged, in violation of Rules 3.140(b) and (d) of the Florida Rules of Criminal Procedure.

18. The Information fails to contain a plain, concise, and definite statement of the essential facts constituting the offense purportedly charged, in violation of Rules 3.140(b) and (d) of the Florida Rules of Criminal Procedure.

19. The Information fails to allege as definitely as possible the time and place of the commission of the offenses charged in the acts or transactions stated, in

violation of Rule 3.140(d)(3) of the Florida Rules of Criminal Procedure.

20. For all the foregoing, aggregate and cumulative reasons, the Information should be dismissed in the interest of Justice.

JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO. 79-2580-CF-Mounts

THE STATE OF FLORIDA,

Plaintiff,

vs.

MARK IZZARD, et al.,

Defendants.

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

I.

INTRODUCTION

The new statutory scheme under which these defendants have been charged, Section 893.135, Florida Statutes, is patently unconstitutional. Notwithstanding the fact that the mandatory minimum sentences may be constitutionally infirm, its subsection, §893.135(3), Florida Statutes, which prohibits individual review and/or the right to be considered for leniency at sentencing unless a convicted defendant "provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals," is condemned by the Fifth and Eighth Amendments to the Constitution of the United States and Article I, Sections 9 and 17 of the Constitution of

the State of Florida as it is: (1) a penalty for the assertion of a constitutional right; (2) a coercive sentencing procedure prohibited by the privilege against self-incrimination; (3) an arbitrary, capricious and irrational punishment in and of itself for the crime either of asserting these rights or having no "substantial assistance" to offer; actions which are not punishable under the Cruel and Unusual Punishment Clause. Sub-section (3) provides:

> "(3) The state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such action. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the action may reduce or suspend the sentence if he finds that the defendant rendered such substantial assistance."

It contains no reference to plea bargaining or pleas, whatsoever. It only operates once one is convicted and is being or has been, sentenced. It exacts a waiver of the Constitutional privilege against self-incrimination to enjoy any hope of reducing or suspending the mandatory minimum sentences the statute imposes. But such a penalty is beyond the power of the legislature to demand. This facially unconstitutional statute must be invalidated by the Court at once since it undermines the integrity of the entire proceedings.

II.

THIS STATUTE MUST BE FOUND UNCONSTITUTIONAL AS IT CONSTITUTES A PENALTY FOR ASSERTING ONES PRIVILEGE AGAINST SELF-INCRIMINATION

This new statute seeks to compel information which naturally and necessarily is self-incriminatory but it provides no coextensive grant of immunity for those who give such "substantial assistance." Without a guarantee that compelled or coerced testimony will not be used, directly or indirectly, to further any criminal prosecution pending or which may be brought against the subject, basic precepts of our accusatorial system of justice are offended. *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972).

In *Garrity v. New Jersey*, 385 U.S. 493, 17 L.Ed.2d 574, 87 S.Ct. 625 (1967), the Supreme Court stated:

> There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. * * * We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.

So stating, the Supreme Court found a waiver of immunity invalid when coerced by the threat of the loss of policemen's job.

In a companion case to *Garrity, supra*, the Supreme Court extended the protection of the Fifth Amendment not only to the exclusion of testimony coerced by the threat of penalty in any subsequent criminal proceedings, but also to invalidating the penalty of disbarrment imposed for the assertion by a lawyer of his Fifth Amendment right not to respond to a subpoena *duces tecum*. *Spevack v. Klein*, 385 U.S. 511, 87 S.Ct. 625 (1967), 17 L.Ed.2d 574. The Court stated, 385 U.S. at 515:

> In this context "penalty" is not restricted to fine or imprisonment. It means, as we said in Griffin v. California, 380 U.S. 609, the imposition of *any sanction which makes assertion of the Fifth Amendment privilege "costly."* (Emphasis added)

Accord, Gardner v. Broderick, 392 U.S. 273, 88 S.Ct. 1913 20 L.Ed.2d 1082 (1968), (statute which attempted to coerce the waiver of ones privilege against self-incrimination without immunity by the penalty of loss of employment was held constitutionally invalid); *Sanitation Men v. Sanitation Comm'r*, 392 U.S. 280, 284, 88 S.Ct. 1917, 29 L.Ed.2d 1089, (1968) (State action of giving public employees "a choice jobs" was unconstitutional). The Court in *Spevack*, found that disbarrment was indeed "costly", 385 U.S. at 516:

> The threat of disbarrment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege. That threat is indeed as much an instrument of compulsion as "the use of legal

process to force from the lips of the accused individual the evidence necessary to convict him. . . ." (citations omitted).

In *Lefkowitz v. Turley*, 414 U.S. 70, 94 S.Ct 316, 38 L.Ed.2d 274, (1973), The Supreme Court confronted a state statute which penalized public contractors who refused to answer questions when called before a grand jury. The statute sought to compel testimony, without any guarantee of immunity, by cancelling any pending contracts as well as prohibiting any further business transactions of the witness with the State. Again, following its earlier holdings in *Garrity*, *Gardner*, *Sanitation Men*, and *Spevack*, the Court held such coercion unconstitutional. In *Turley*, the Court stated, 414 U.S. at 83:

> We fail to see a difference of constitutional magnitude between the threat of job loss to an employee of the State, and a threat of loss of contract to a contractor.

The Florida courts have followed this line of authority and have held that one cannot be constitutionally coerced to waive ones right against self-incrimination by threat of job loss. *See, e.g., Anson v. Department of Revenue*, 354 So.2d 386 (Fla. DCA 1977); *Lurie v. Florida State Board of Denistry*, 288 So.2d 223 (Fla. 1973).

There is, however, a great difference between job loss or loss of contractual promises as involved in the cases cited above, and the loss of liberty and the right to individual sentencing consideration and/or leniency involved in the case before this Court. Certainly the loss of liberty must demand as much if not more protection

by the Fifth Amendment than the threat of pecuniary loss.

And so the federal courts have uniformly recognized. Where judges have sought to punish silence and/or reward a confession or assistance to the government by a defendant at sentencing and have expressly stated that these factors will determine the sentence they impose, these sentences have been vacated as unconstitutionally coercive, upon the same rationale as those cases cited above. For example, *Thomas v. United States*, 368 F.2d 941 (5th Cir. 1966), the sentence imposed was vacated upon a post-conviction remedy application under 28 U.S.C. §2255 and was remanded for resentencing because the trial judge had indicated that if the defendant would confess his guilt at sentencing he would receive a more lenient sentence but if defendant persisted in his denial of wrongdoing the court would take that into account. In vacating the sentence the Fifth Circuit stated, 368 F.2d at 946:

> When Thomas received harsher punishment than the court would have decreed had he waived his Fifth Amendment rights, he paid a judicially imposed penalty by exercising his constitutionally guaranteed rights.

In *United States v. Rodriquez*, 498 F.2d 302 (5th Cir. 1974), the Fifth Circuit again remanded a case for resentencing because the judge had pressured the defendants to tell the truth about their involvement in the crime or face a harsher sentence. The Court reiterated that a defendant retains important Fifth Amendment rights even after a jury verdict, *see also, United States v. Yurasovich*, 580 F.2d 1212 (3rd Cir. 1978), and that a

defendant therefore cannot be constitutionally placed in the position of either abandoning those rights or risking a harsher sentence.

In a case strikingly similar to the statutory sentencing procedure embodied in §893.135, Florida Statutes, the Fifth Circuit also vacated a sentence where the trial court had indicated its disapproval with the defendant for not cooperating with the government in identifying his co-conspirators. *United States v. Rogers*, 504 F.2d 1079 (5th Cir. 1974). The trial court had said that was the first step towards rehabilitation and that a lesser sentence would be consisdered if the defendant gave material and productive cooperation to the government. The Fifth Circuit held that there was no distinction between confessing guilt and possibly implicating ones own self by implicating others. Therefore, to request such assistance was as much an unconstitutional imposition upon ones right to remain silent as confessing guilt was. *Accord, United States v. Acosta*, 501 F.2d 1330, 1337-78 (5th Cir. 1974) (dissenting opinion of Judge Gee captioned "The Sentencing Procedure") adopted *en banc*, 509 F.2d 539 (5th Cir. 1975). As it was persuasively stated in *United States v. Garcia*, 544 F.2d 681 (3d Cir. 1976):

> The appellants were put to a Hobson's choice: remain silent and lose the opportunity to be objects of leniency, or speak and run the risk of additional prosecution. A price tag was thus placed on appellants' expectations of maximum consideration at the bar of justice: They had to waive the protection afforded them by the Fifth Amendment. This price was too high.

We, therefore, cannot permit the sentence to stand.

Contrary to this well-settled body of law, under sub-section (3), the Florida Legislature mandates this unconstitutional, coercive method of obtaining evidence. Worse, the Legislature seeks to force the Judicial Branch to embrace this unconstitutional sentencing procedure. But the very purpose of the Judiciary is to protect the accused against the excesses of the Legislature and the Executive and to defend the state and federal constitutions from encroachment.

III.

THE STATUTE IS UNCONSTITUTIONAL AS CONSTITUTING A SEPARATE AND DISTINCT PUNISHMENT FOR THE CRIME OF FAILING TO GIVE "SUBSTANTIAL ASSISTANCE"—A CRIME THE PUNISHMENT OF WHICH IS PROHIBITED BY THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE.

The statute before us, specifically sub-section (3) of §893.135, providing for the right to leniency only on the abandonment of ones privilege against self-incrimination, must kindle outrage in the hearts of all judges who have sworn to uphold the Constitutions of the State of Florida and the United States. As opposed to the invalid sentencing techniques outlined in the above Fifth Circuit cases, this statute can only be characterized as a return to the Star Chamber Oath and other historical abuses the Framers had meant the

Fifth Amendment to eliminate, *Miranda v. Arizona*, 384 U.S. 436, 459-460, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Under this statute, each defendant, regardless of his individual culpability or character or prior record, will face the same mandatory minimum sentence, unless he waives his constitutional right to remain silent. Under this statute, each defendant, regardless of his potential for rehabilitation is ineligible for parole until the termination of the mandatory minimum term (§893.135(2)) unless he waives his privilege against self-incrimination. Here, each defendant, regardless of the myriad factors in mitigation which might be present in individual cases, has only one method by which to gain individual consideration and a chance for leniency—waiver of the guarantee that he will not be compelled to testify against himself. And here, most importantly, each defendant regardless of whether he has or knows of "accomplices, accessories, co-conspirators or principlas," indeed regardless of whether he can and/or wishes to provide assistance that may or may not be "substantial," can only receive individual sentencing consideration or leniency by the use of this subsection.

It is clearly possible that under the myriad of likely circumstances that might arise in prosecutions under this statute that a defendant would have no "substantial assistance" to give or that the assistance he could give would not be deemed "substantial" enough to satisfy the requirements of subsection (3). As an illustration, a trafficker's 18 year old daughter who consents to her father's request to hold the keys to a truck loaded with cannabis, may be charged under §893.135. If she has good reason to know it is loaded with marijuana, since she has the keys, the law will impute constructive possession to her. If she cannot

bring herself to turn informer against her own father, or if she cannot render "substantial assistance" in his identification, arrest or conviction"—for any of a multitude of likely reasons[1] —she will, indeed must, suffer the full mandatory minimum prison term despite her individual high character and relative lack of blameworthiness. The possibilities of injustice are countless.[2]

Were the procedure provided for by subsection (3) only imposed in a few individual cases, it would be unconstitutional enough. But because the statute provides that it must be applied in each and every case brought for the substantive crimes embodied in §§893.135 and 893.13, it is itself a punishment: a punishment that is not only prohibited by the guarantee that one will not be compelled to give testimony against himself but is also arbitrary and capricious and must be outlawed as cruel and unusual punishment.

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[1]Her father may have already been convicted; he may have made a deal to immunize himself form prosecution; he may have committed suicide out of anguish for his daughter's predicament created by himself.

[2]It should be pointed out also that this punishment will most probably be inflicted arbitrarily. Subsection (3) sets forth no guidelines for the reaping of its benefits by giving "substantial assistance." Rather, its permissive language suggests that the prosecutor has unbounded discretion whether, (1) he will consider the assistance "substantial" or not, (2) he will intercede to make known this assistance, and whether, indeed (3) he will accept such assistance when a particular defendant profers it to him. This standardless offer of intercession is, therefore, patently arbitrary and open to capricious application, all in violation of contemporary notions of due process as embodied in the Fourteenth Amendments to the Constitution of the United States and in Article I, Section 9 of the Constitution of the State of Florida.

One is reminded of the insightful words of Justice Bradley in *Boyd v. United States*, 116 U.S. 616, 635, 29 L.Ed.694, 752, 6 S.Ct. 524 (1886):

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, both silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

And so the Supreme Court in deciding *Robinson v. California*, 370 U.S. 660, 8 L.Ed.2d 758, 82 S.Ct. 1417 (1962)—adhering to the spirit expressed above—first held that the Eighth Amendment prohibition against cruel and unusual punishment must, in addition to outlawing the use of abhorrent physical punishment, also set limits on the power of a State to prescribe what can be made a crime and punished as such. In *Robinson*, the Court held that the State cannot constitutionally punish a person for the status of being a drug addict. In explanation, the Court stated, 370 U.S. at 667:

> To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.

Here, too, the question cannot be considered in the abstract:" the question of leniency and/or a lesser sentence than the mandatory minimum prescribed by §§893.135 and 893.13 cannot be considered separate from the crime it punishes. It is rather the fact that any punishment exacted for the assertion of ones privilege against self-incrimination must, on its face, be cruel and unusual punishment, as it is beyond the power of a state to make such action a crime. Further, it is beyond the power of the State to arbitrarily punish a person who has no "substantial assistance" to give, as subsection (3) will do to all defendants who are only tangentially involved with the crime of which they are convicted— in this context, the punishment of the loss of the right to be considered for individual sentencing consideration and/or leniency will be exacted for a "status" the defendant has no more control over than he would if he had a common cold.[3]

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[3]It is ironic, to say the least, that it is the "ringleader" who will be the person most appropriately situated to reap the benefits of this subsection, while the person whose involvement in the crime charged is merely peripheral and who is the least blameworthy will be the person most likely to be punished by it. Subsection (3) therefore stands normal sentencing procedure on its head: the defendant with the most substantial assistance to give because his contact with crime has been continual may indeed receive a suspended sentence, while a defendant who is convicted for his first brush with the law and therefore has no information to profer to the State must be punished to the full extent of the mandatory minimum sentence.

It is no answer that the State may have a substantial interest in trying to curb drug trafficking in Florida and that therefore the Legislature has a rational basis for enacting this provision. The Supreme Court stated in *Robinson, supra*, that there was no question that California had a substantial interest in trying to curb the spread of drug addiction. It stated, however, there were many ways this interest could be implemented, but one of them could not be to punish addition as a crime.

> It is unlikely that any state at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflications be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offene of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

Id., 380 U.S. at 666.

So, too, here defendants would concede that the State has substantial interests in bringing to the bar of justice persons "trafficking in cannabis" and in obtaining evidence sufficient to convict them. However, we submit, there are countless ways that the State may accomplish these interest without offending the Constitution. It may

provide for a larger tax base in order to fund special investigation units or a larger staff of prosecutors. Indeed, within constitutional limits, the State may exact any penalty for the crime of trafficking in drugs it sees fit. However, "lifting the lot of the prosecutor is no answer to the claim that a constitutional right is violated." *State v. Buchman*, 361 So.2d 692 (Fla. 1978).

The rationale the Supreme Court applied to invalidate the status crime of drug addiction involved in *Robinson, supra*, also must invalidate the punishment of loss of individual sentencing consideration and leniency embodied in the statute under which the defendant is now charged. The Supreme Court's decision in *Robinson* was predicated upon its interpretation that the Cruel and Unusual Punishment Clause "stands to assure that this power be exercised within the limits of civilized standards." *Trop v. Dulles*, 356 U.S. 86, 100, 2 L.Ed.2d 630, 78 S.Ct. 590 (1959), and that punishments must be a reflection of "evolving standards of decency that mark the progress of a maturing society." *Id.*, 356 U.S. at 101.

The privilege against self-incrimination has been hailed as "one of the great landmarks of man's struggle to make himself civilized." *Ullman v. United States*, 350 U.S. 422, 426, L.Ed. 511, 76f C.Ct. 497 (1956). In *Murphy v. Waterfront Commissioner of New York*, 378 U.S. 52, 55-56, 12 L.Ed. 2d 678, 84 S.Ct. 1594 (1964), The Supreme Court catalogued the policies this privilege embodies:

> It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or

contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by unhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load, "8 Wigmore, Evidence (McNaughton rev. 1961), 317; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," United States v. Grunewald, 233 F.2d 556, 581-582 (Frank, J., dissenting), rev'd 353 U.S. 391, 1 L.Ed.2d 931, 77 S.Ct. 963; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

The Florida Legislature, in making the assertion of the privilege a crime under §893.135(3), has gone beyond the bounds of its power to create and punish aberrant social behavior for the protection of its citizens. Therefore, the statute exceeds the "substantive limits of what can be made criminal and punished as such" for which the decision in *Robinson, supra*, stands. *Ingraham v. Wright*, 430 U.S. 651, 667, 51 L.Ed.2d 711, 97 S.Ct. 1401 (1971).

There have been various erroneous attempts to extend the rationale of *Robinson v. California, supra*, to

prohibit any crime which lacks the element of *mens rea*. *See, e.g., Powell v. Texas*, 392 U.S. 514, 20 L.Ed.2d 1254, 88 S.Ct. 2145 (1968); and there has been much discussion about what this case stands for in the abstract, *see, e.g.*, Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 Harv. L. Rev. 635 (1966). Despite these disputes, there can be no serious question that the Cruel and Unusual Punishment Clause, at the very least, now prohibits punishment for the crime of asserting a constitutional privilege. In elaborating on the extent of the decision in *Robinson*, Justice Marshall, announcing the judgment of the Court and delivering the decision in which Chief Justice Warren and Justices Black and Harlan joined, stated in *Powell v. Texas, supra*, 392 U.S. at 533:

> The entire thrust of Robinson's interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*.

Clearly, the Constitution does not permit a State to make it a crime for one to assert his privilege against self-incrimination and to exact a punishment for such a crime. The assertion of the privilege simply is not an action "which society has [or can have] an interest in preventing."

That the privilege stands as a bar to creating this substantive crime is by no means a novel idea. An entire constellation of crimes have been invalidated

based upon this proposition. The United States Supreme Court, in *Marchetti v. United States*, 390 U.S. 39, 19 L.Ed.2d 887, 88 S.Ct. 687 (1968), and *Grosso v. United States*, 390 U.S. 62, 19 L.Ed.2d 906, 88 S.Ct. 709 (1968), held that the assertion of the Fifth Amendment privilege against self-incrimination was a complete defense to a prosecution for failure to comply with the Federal gambling registration and tax statutes. Further, in *United States v. U.S. Coin and Currency*, 401 U.S. 715, 28 L.Ed.2d 434, 91 S.Ct. 1041 (1971), the Court held that in forfeiture proceedings the same rationale obtains and the Fifth Amendment will act as a bar to prosecution. These decisions were predicated upon the principle that asserting ones privilege against self-incrimination is a "kind of conduct that cannot constitutionally be punished in the first instance." *United States v. U.S. Coin & Currency, supra*, 401 U.S. at 723. Likewise, the Supreme Court has held that the privilege against self-incrimination was a complete defense under the Firearms Registration Act, *Haynes v. United States*, 390 U.S. 85, 19 L.Ed.2d 923, 88 S.Ct. 722 (1968); and that the assertion of ones privilege against self-incrimination is a complete defense to prosecution charging a violation of the Marijuana Tax Act for failing to record and pay the transfer tax the Act imposed; *Leary v. United States*, 395 U.S. 6, 23 L.Ed.2d 57, 89 S.Ct. 1532 (1969); *United States v. Covington*, 395 U.S. 57, 23 L.Ed.2d 94, 89 S.Ct. 1559 (1969). *Accord, Harrington v. United States*, 444 F.2d 1190 (5th Cir. 1971); *Alverez v. United States*, 426 F.2d 301 (5th Cir. 1970); *United States v. Goldberg*, 426 F.2d 485 (5th Cir. 1960); *Thompson v. United States*, 421 F.2d 174 (5th Cir. 1970).

As it is stated without reservation in the above cases, the conduct of asserting ones privilege against

self-incrimination is the "kind of conduct that cannot constitutionally be punished in the first instance." *United States v. U.S. Coin and Currency, supra*, 401 U.S. at 723. It fails for want of "some behavior, which society has an interest in preventing." *Powell v. Texas, supra*, 392 U.S. at 533. Therefore, it is condemned by the Cruel and Unusual Punishment Clause of the Constitutions of the United States and of the State of Florida. The Supreme Court of this State has expressed the identical limitation upon the power of the Legislature by finding that is is only "within constitutional limits, the legislature may prohibit any act, determine the grade or class of the offenses, and prescribe the punishment. *State v. Bailey*, 360 So.2d 772, 773 (Fla. 1978), *c.f.*, *Gammell v. Wainwright*, 357 So.2d 714 (Fla. 1978) (suspending a sentence for kidnapping until end of treatment as sex offender).

IV.

CONCLUSION

This "substantial assistance" provision embodied in §893.135, of which the defendants have been charged in the instant case, must fall as violative of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 9 of the Constitution of the State of Florida as it exacts a legislatively imposed penalty for the assertion of a defendant's right not to be compelled to testify against themselves. While it is beyond dispute that in any event whatever testimony may be coerced from a convicted defendant hereunder could not be used against him, the remedy extends beyond this curative measure: it mandates that the penalty be voided in its entirety.

C.f., Garrity v. New Jersey, supra; Spevack v. Klein, supra; Gardner v. Broderick, supra; Sanitation Men v. Sanitation Comm'r, supra, Lefkowitz v. Turley, supra. In addition, a sentence imposed under such a coercive technique, must be vacated; *see, e.g., Thomas v. United States, supra; United States v. Rodriquez, supra; United States v. Rogers, supra; United States v. Acosta, supra.*

Further, this "substantial assistance" provision must fall as violative of the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 17, Constitution of the State of Florida, in that it makes it a punishable crime to assert ones privilege against self-incrimination: a crime which exceeds the "substantive limits of what can be made criminal and punished as such." *Ingrahm v. Wright, supra,* 430 U.S. at 667.

It should be emphasized further that it will not suffice to merely sever subsection (3) from the statute under which the defendants have been charged in this case. It was clearly the intent of the Legislature in drafting this statute that most defendants convicted thereunder would make use of this punitive and unconstitutional "substantial assistance" provision and that the mandatory sentences the remainder of the statute provides for would be accordingly applied sparingly. Therefore, once this "substantial assistance" provision is vitiated as unconstitutional, were the remainder of the statute to remain in force the fiscal impact of the law would drastically exceed the anticipations of the Legislature when they passed this law. For the analogous reasons that the Supreme Court in *Marchetti v. United States, supra,* 390 U.S. at 60, found severability inadequate to save the wagering

tax laws, we submit that these fiscal considerations represent the type of considerations "the Constitution has entrusted to Congress, and not to this Court," and "the striking an appropriate balance among such values" should be now resubmitted to the Legislature to determine. Indeed, the entire statute must fall notwithstanding the presence of a savings clause in this statute. A savings clause can only operate if the "unconstitutional portion of an Act can be logically excised from the remaining valid provisions without doing violence to the Legislative purpose" and "if the valid and invalid provisions are not so inseparable that the Legislature would not have enacted one without the other. *High Ridge Management Corp. v. State*, 354 So.2d 377 (Fla. 1977). The legislative intent would be so frustrated if the remainder of the statute were left to stand once the "substantial assistance" provision must fall, that the statute should be stricken in its entirety, in order that the Legislature may reassess the fiscal impact and redraft the statute in accordance with the Constitutions of the United States and the State of Florida. Nothing less will suffice.

Respectfully submitted,

IN THE CIRCUIT COURT OF THE 15th JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY STATE OF FLORIDA

CRIMINAL DIVISION

NO. 79-2580-CF-MOUNTS

STATE OF FLORIDA

Plaintiff,

vs.

MARK WILLIAM IZZARD,
WAYNE LAMAR KACKLEY,
JAMES GILBERT COWHEARD,
JACKSON LOCKARD HOWELL,

Defendants.

MOTION TO SUPPRESS

The defendants, MARK WILLIAM IZZARD, WAYNE LAMAR KACKLEY, JAMES GILBERT COWHEARD and JACKSON LOCKARD HOWELL, by and through their undersigned counsel, respectfully move this Honorable Court, pursuant to Rule 3.190(h)(1)(2)(4) and (5) and Rule 3.190(i), Florida Rules of Criminal Procedure, to suppress all evidence seized and statements obtained by way of two illegal searches and seizures.

In support thereof, the defendants allege that the warrants were insufficient on their face, there was no probable cause to believe the existence of the grounds

on which the warrants were issued, and the warrant on the home was illegally executed.

Two search warrants were obtained, one for a home at 721 Marine Drive, Boca Raton, Florida (Appendix A); the other for a vessel named "Narrisa", docked behind said house (Appendix B). It is conceded that if the Court finds the first search *warrant* for the house to be proper in all aspects, then probable cause existed for issuance of the second warrant for the vessel.

Several bases are reflected within the search warrant for the house to support the probable cause standard. Many of these are insufficient.

1. There is no indication that the informant utilized in this matter is reliable. Thus, the believability and credibility of this information is questionable.

2. There is no indication that any of the individuals involved in the earlier search warrant (July 25, 1978) conducted at that address are the present defendants.

3. There was no information reflecting any particular information about the vessel "Narrisa" and its itinerary and/or cargo.

The Affidavit only reflects individuals carrying bales of an unknown substance between the vessel and the house. It is submitted that this is insufficient to meet probable cause standards.

Further, the Affidavit contains numerous instances of double and triple hearsay, so as to raise a question

regarding the validity of the information contained therein.

Last, the execution of the search warrant on the house was improper.

WHEREFORE, for the foregoing reasons, the defendants respectfully move this Honorable Court to suppress all evidence seized and statements obtained in the execution of the search warrants in the above-styled matter.

IN THE 5th Judicial Circuit. IN AND FOR
PALM BEACH COUNTY, FLORIDA

THE STATE OF FLORIDA,)
COUNTY OF PALM BEACH)

BEFORE ME, Honorable W. C. Williams, Circuit Court Judge in and for the 15th Judicial Circuit of Florida. in and for THE CITY OF BOCA RATON, personally appeared this day Detective John Brady who being by me first duly sworn, deposes and says that he believes and has good reason to believe that a certain premises located in Palm Beach County, City of Boca Raton, Florida, described as follows, to-wit: A certain residence located at 721 Marine Drive, Boca Raton, Florida. Said single family residence is a concrete block structure, white in color with white tiled roof. Said residence is identified by the black numbers 7, 2, 1, affixed to the south facing wall adjacent to and immediately east of the southfacing front door of said residence.

To reach said premises, go east on Marine Drive from the intersection of Marine Drive and N.E. 6th Drive to the fourth (4th) house on the north side of Marine Drive. 721 Marine Drive, Boca Raton, Florida is the premises to be searched.

being the premises occupied by or under the control of Person or persons Unknown and there is now being kept on the above described premises certain Dangerous Drugs, to-wit; Cannibis Sativa in the form of marijuana which is being kept and used in violation of the laws of the State of Florida, to-wit: the laws prohibiting Possession of Cannibis Sativa, to-wit; marijuana

Exhibit A

Your Affiant is a Police Officer in and for the City of Boca Raton, County of Palm Beach, State of Florida, having been so employed since July 5, 1977. Your Affiant has worked in the Vice-Narcotics Unit for the Boca Raton Police Department for at least 14 months. During that time, your Affiant has had numerous occasions to investigate subject involved in the illegal importation and distribution of Marijuana, in violation of the laws of the State of Florida. On at least ten (10) previous occasions, your Affiant has observed packaged bales of marijuana. Your Affiant has received training, approximately 24 hrs. from the Drug Enforcement Administration.

On July 2, 1979, your Affiant was advised by Detective John Marinello that certain suspicious activities had been observed by a subject in the neighborhood of 721 Marine Drive, Boca Raton, Florida, including the docking of a large vessel named "The Nerrissa" (phonetic spelling) at the rear of 721 Marine Drive, Boca Raton, Fla. Also observed by a neighbor of the residence at 721 Marine Drive was a late model brown Van, which was pulled in the garage area of 721 Marine Drive. Subsequent to the van being pulled in the door was shut. Further, said confidential source advised Detective Marinello that at least two white males, in their early 30's, had been observed in and out of the residence at 721 Marine Drive, during the times that the vessel "The Nerrissa" was docked at the rear of said residence.

Subsequent to this information on July 2, 1979, at approximately 9 p.m., your Affiant began a fixed surveillance from N.E. 6th Drive, bordering the rear

canal of 721 Marine Drive Upon arrival, your Affiant observed a large white vessel, with a large tower on top, docked at the rear of 721 Marine Drive, Boca Raton, Fla. At approximately 9:15 p.m. on 7-2-79, your Affiant observed a late model two-tone brown van, operated by a W/M, approximately 30 yrs. old pull into 721 Marine Drive. Your Affiant believes said van was pulled into the garage of 721 Marine Drive. Your Affiant continued the surveillance of the rear dock area and the vessel "Nerrissa". At approximately 11:30 p.m., your Affiant was joined at the surveillance point by Ptlm. Donald Osberg, of the Boca Raton Police Department.

At approximately 1 a.m., July 3, 1979 your Affiant and Ptlm. Osberg observed three (__ white males, dressed in dark clothing proceed out to the vessel "Nerrissa" and subsequent__ were observed by your Affiant and Ptlm. Osberg to off-load at least 15 large bales of what your Affiant has observed on previous occasion to be marijuana. Said subjects were observed by your Affiant to be carrying the bales off of the vessel "Nerrissa" and into the west door of the residence at 721 Marine Drive, Boca Raton, Florida.

Your Affiant was aided in these observation with the use of a Startron night scope, which through the viewer's eye illuminates the area that is observed, so that said subject and bales of marijuana were clearly seen by your Affiant.

Subsequently, your Affiant immediately notified other members of the Vice-Narcotics Unit of the Boca Raton Police Department and Ptlm. Osberg remained at the surveillance point with a view of the residence.

WHEREOF, affiants make this affidavit and pray the issuance of a search warra__ due form of law for the search of the above described (vehicle) (premises) for the said __erty, heretofore described, and for the seizure and safe keeping of the property, subject the order of this Honorable Court or such other Court having jurisdiction over the of__ by the duly constituted officers of the law.

John W. Brady Jr.
AFFIANT

AFFIANT

Sworn to and subscribed before me this 3rd day of July, 19__

WC. Williams III
JUDGE in and for Palm Beach County, F____

IN THE 15th Judicial Circuit IN AND FOR PALM BEACH COUNTY, FLORIDA

THE STATE OF FLORIDA,)
COUNTY OF PALM BEACH)

BEFORE ME, Honorable W.C. Williams, III, Circuit Court Judge, in and for the 15th Judicial Circuit of Florida in and for THE CITY OF BOCA RATON, personally appeared this day Detective John Brady who being by me first duly sworn, deposes and says that he believes and has good reason to believe that a certain vessel located in Palm Beach County, City of Boca Raton, Florida, described as follows, to-wit:

A certain vessel named the "Nerrisa", with a hailing port of New Jersey, bearing Fla. registration numbers FL6780CH affixed to the upper portion of both side of the bow of said vessel. Vessel is white in color with blue and black stripes at the water line. Said vessel is further identified by the brand name "Trojan" affixed to the side of vessel. Said vessel was docked and tied to the rear dock area at 721 Marine Drive, Boca Raton, Florida. Said vessel is further identified by the name "Nerrisa", New Jersey, painted on the rear of said vessel.

To reach said vessel and premises proceed east on Marine Drive from the Intersection of Marine Drive and N.E. 6th Drive to the fourth (4th) house on the north side of Marine Drive. The vessel "Nerrisa" bearing a hailing port of New Jersey, and Fla. registration numbers FL6780CH is the vessel to be searched. Proceed

from front of 721 Marine Drive, north to the rear of 721 Marine Drive in the wooden dock attached to the seawall of 721 Marine Drive. Said vessel, "Nerrisa" is tied to the dock at 721 Marine Drive.

being the vessel owned, registered occupied by or under control of James Gilbert Cowheard Wayne Lamara Kackley Mark William Izzard Jackson Howell and there is now being kept on the above described vessel certain Dangerous Drugs, to-wit; Cannibis Sativa in the form of Marijuana which is being kept and used in violation of the laws of the State of Florida, to-wit: the laws prohibiting Possession of Cannibis Sativa, to-wit; Marijuana

Exhibit B

That the facts establish the grounds for this application and the probable cause for believing that such facts exist are as follows:

Your Affiant is a Police Officer in and for the City of Boca Raton, County of Palm Beach, State of Florida, having been so employed since July 25, 1977. Your Affiant has worked in the Vice-Narcotics Unit for the Boca Raton Police Department for at least 14 months. During that time, your Affiant has had numerous occasions to investigate subjects involved in the illegal importation and distribution of Marijuana, in violation of the laws of the State of Florida. On at least ten (10) previous occasions, your Affiant has observed packaged bales of marijuana. Your Affiant has received training, approximately 24 hrs. from the Drug Enforcement Administration.

On July 2, 1979, your Affiant was advised by Detective John Marinello that certain suspicious activities had been observed by a subject in the neighborhood of 721 Marine Drive, Boca Raton, Florida, including the docking of a large vessel named "The Nerrissa" (phonetic spelling) at the rear of 721 Marine Drive, Boca Raton, Fla. Also observed by a neighbor of the residence at 721 Marine Drive was a late model brown van, which was pulled in the garage area of 721 Marine Drive. Subsequent to the van being pulled in, the door was shut. Further, said confidential source advised Detective Marinello that at least two white males, in their early 30's, had been observed in and out of the residence at 721 Marine Drive, during the times that the vessel "The Nerrissa" was docked at the rear of said residence.

Subsequent to this information on July 2, 1979, at approximately 9 p.m., your Affiant began a fixed surveillance from N.E. 6th Drive, bordering the rear canal of 721 Marine Drive. Upon arrival, your Affiant observed a large white vessel, with a large tower on top, docked at the rear of 721 Marine Drive, Boca Raton, Fla. At approximately 9:15 p.m. on 7-2-79, your Affiant observed a late model two-tone brown van, operated by a W/M, approximately 30 yrs. old pull into 721 Marine Drive. Your Affiant believes said van was pulled into the garage of 721 Marine Drive. Your Affiant continued the surveillance of the rear dock area and the vessel "Nerrissa". At approximately 11:30 p.m., your Affiant was joined at the surveillance point by Ptlm. Donald Osberg, of the Boca Raton Police Department.

At approximately 1 a.m., July 3, 1979 your Affiant and Ptlm. Osberg observed three (3) white males, dressed

in dark clothing proceed out to the vessel "Merrissa" and subsequently were observed by your Affiant and Ptlm. Osberg to off-load at least 15 large bales of what your Affiant has observed on previous occasion to be marijuana. Said subjects were observed by your Affiant to be carrying the bales off of the vessel "Nerrissa" and into the west door of the residence at 721 Marine Drive, Boca Raton, Florida.

Your Affiant was aided in these observations with the use of a Startron night scope, which through the viewer's eye illuminates the area that is observed, so that said subject and bales of marijuana were clearly seen by your Affiant.

Subsequently, your Affiant immediately notified other members of the Vice-Narcotics Unit of the Boca Raton Police Department and Ptlm. Osberg remeained at the surveillance point with a view of the residence.

Further, your Affiant was advised by Detective Marinello that the residence 721 Marine Drive, Boca Raton, Florida was the subject of a search warrant by this Department on July 25, 1978, involving a marijuana importation operation centered out of said residence. Detective Marinello further advised your Affiant that the confidential source in the area of 721 Marine Drive had been suspicious of the aforementioned activities involving vans pulling into the garage area as these activities were of the same type that were observed involving the previous investigation of importation of marijuana. At the time of the last search warrant in excess of 100 pounds of marijuana was seized from 721 Marine Drive.

Further; thru investigation of subjects involved in the importation and distribution of marijuana in the past, your Affiant knows that on previous occasions subjects have used waterfront houses, such as 721 Marine Drive, whose canal provides direct access to the Intracoastal Waterway and Atlantic Ocean. Further; your Affiant knows from previous experience that subjects often utilize a garage for the loading of vehicles particularly vans with large quantities of marijuana without being seen from the outside.

Further; your Affiant believes that there is now being kept in the residence of 721 Marine Drive in excess of 100 pounds of marijuana, in violation of the Drug Abuse Laws of the State of Florida.

/s/ W.C. Williams III
Circuit Judge

/s/ John W. Brady J

Page Two

Further; on 7-3-79, at approximately 3:35 a.m., your Affiant along with members of the Vice-Narcotics Unit and members of the Boca Raton Police Department executed a search warrant at 721 Marine Drive, Boca Raton, Florida. Upon execution of the search warrant, approximately 80 bales of marijuana were found inside the residence. Four white males were arrested by your Affiant. Upon proceeding to the rear dock at 721 Marine Drive your Affiant observed the vessel "Nerrisa" tied to the rear dock. The vessel is so designated by the letters N, E, R, R, I, S, A, with a hailing port of New Jersey. Further, said vessel on upper portion of both

sides of the bow are designated with Florida registration numbers, FL6780CH. A check thru Florida Marine Patrol indices reveal no record for the aforementioned numbers. The vessel is a Trojan make with a Trojan engine attached to vessel. Vessel is white in color, with a large flying bridge and blue and black stripes at the water line.

Upon standing on dock next to the vessel "Nerrisa", your Affiant observed marijuana lying on the running boards at the opening of the rail where your Affiant had earlier observed subjects off-loading bales of marijuana from the cabin of said vessel.

Further; your Affiant sayeth not.

WHEREOF, affiants make this affidavit and pray the issuance of a search warrant in due form of law for the search of the above described vessel for the said property, heretofore described and for the seizure and safe keeping of the property, subject to the order of this Honorable Court or such other Court having jurisdiction over the offense by the duly constituted officers of the law.

/s/ John W. Brady Jr
AFFIANT

AFFIANT

Sworn to and subscribed before me this 3rd day of July, 1979.

/s/ W.C. Williams III
JUDGE in and for Palm Beach County, Florida
5:39 AM

[RECEIVED DEC 13 1979]

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO. 79-3580 CF

STATE OF FLORIDA,

vs.

MARK W. IZZARD, WAYNE L. KACKLEY, JAMES G. COWHEARD and JACKSON L. LOWELL,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS

Defendants, Mark W. Izzard, Wayne L. Kackley, James G. Cowheard, and Jackson L. Howell, by and through their undersigned counsel submit the following reasons and authorities in support of their motion to suppress the evidence from the two illegal searches and seizures.[1]

[1]The motion, of course, is intended to cover violation of Art. I, §12, Fla.Const., Amendments 4 and 14, U.S. Const., and §§ 933.04 and 933.18, Fla.Stat.

The Affidavit for Search Warrants

Affiant, John W. Brady, Jr., a police officer for the City of Boca Raton, Florida, stated that in his experience in narcotics investigations he has on at least 10 previous occasions *observed packaged bales* of marijuana. He stated further that on July 2, 1979, he was advised by a Detective Marinello, that certain *suspicious activities* had been seen "by a subject" in the neighborhood of 721 Marine Drive, Boca Raton, Florida. These suspicious activities included i) the docking of a large vessel at the rear of said residence, ii) the observance by the subject of a late model brown van entering the garage area of said residence; iii) the garage door being shut; and iv) observation of two white males "in and out" of the residence.

Affiant informed the court in his affidavit that he took up surveillance from N.E. 6th Drive bordering the rear canal of 721 Marine Drive and observed at approximately 9:15 p.m. a late model two tone brown van operated by a white male approximately thirty years old which van entered the garage of 721 Marine Drive.

At approximately 11:30 p.m., Officer Brady was joined by another officer Donald Osberg of the Boca Raton Police Department.

Quite simply, at this juncture there is nothing in the affidavit that constitutes probable cause to support the issuance of a search warrant to search the premises.

Next, John Brady states that at approximately 1:00 a.m. on July 3, 1979, he and Officer Osberg observed

three white males proceeding out to the vessel and they were observed by Officer Osberg and himself to off-load at least *15 large bales of what your affiant has observed on previous occasions to be marijuana.*"

The bales were observed being carried into the residence at 721 Marine Drive. To establish that he saw the subjects carrying *bales of marijuana* Officer Brady states:

> "*Your Affiant was aided in these observation with the use of a Startron night scope, which through the viewer's eye illuminates the area that is observed, so that said subjects and bales of marijuana were clearly seen by your affiant.*" (Emphasis added)

Thus, Officer Brady under oath, represented to the court that *the area was illuminated by the use of the night scope so* that *he clearly observed bales of marijuana.* Officer Brady made a false statement knowingly in his affidavit or with reckless disregard for the truth. Proof of Brady's reckless disregard for the truth was revealed by his own testimony at the hearing on the Motion to Suppress. Officer Brady stated initiallyduring his testimony that he had a night scope to enhance night vision and that he saw *three white males* come out and enter into the vessel at 1:00 a.m. (T 17, 18).[2]

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[2]Reference to the transcript of the testimony taken at the Motion to Suppress will be by the use of the symbol "T" followed by the appropriate page number.

Brady, who was approximately 100 yards away from the rear of the premises testified that the night scope helped him see better than he could see without it (T 19).

Officer Brady's reckless disregard for the truth is reflected in his following testimony:

"Q. Now, I want to go back to one other area, the night scope you were looking through. (T 24)

"A. Yes, sir.

"Q. Could you even tell from looking through it whether the people you saw were white people or black people or oriental people or anything like that? (T 25)

"A. No, sir.

"Q. All you could see was figures, is that a fair statement?

"A. Yes, sir.

"Q. Figures of persons, figures of bundles?

"A. Yes, sir.

"Q. Or packages or what have you, is that a fair statement?

"A. Yes, sir."

Further testimony of Officer Brady which refuted his statements in the affidavit that he could clearly see the bales of marijuana appear:

"Q. Are there particular things that marijuana is wrapped in, in your experience? (T 21)

"A. Yes, sir.

"Q. What are those things?

"A. Burlap bags.

"Q. Is it always burlap bags?

"A. No, sir.

"Q. What?

"A. No, sir.

"Q. What else does it come wrapped in?

"A. Plastic bags, cardboard boxes.

"Q. Okay, Could you tell from where you were at approximately 1:00 o'clock in the morning whether these were cardboard boxes, burlap bags or plastic bags?

"A. No, sir.

"Q. I'm sorry?

"A. No, sir.

"Q. You could not?

"A. No."

As to describing the bundles or packages being carried, Officer Brady could not even tell if the packages had handles on them or even if they were wrapped in rope or twine (T 29). He stated that the packages appeared to be uniform in shape (T 28).

As to the reference in his affidavit that the same house was searched a year ago, and marijuana was found therein, Brady readily conceded that it would have no bearing as to the house being used again (T 38, 39).[3]

Adverting to the testimony of Officer Osberg who joined the surveillance at approximately 11:30 p.m. he made the following comments about the use of the night scope which clearly indicate Brady's statement in his affidavit about the night scope enabling him to clearly see the subjects and bales of marijuana was false:

"Q. Did you make some of your observations through the use of the night scope? (T 6)

"A. No.

"Q. You did not use it at all?

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[3]The Court questioned why the search of premises for marijuana a year earlier was mentioned in the affidavit (R 42). Brady stated that it was just to show access to the dock and the boat (R 42).

"A. No, I did use it but I could see better with my own eyes. (T 7)

"THE COURT: Excuse me, can you repeat that?

"THE WITNESS: I could see better with my own eyes than what I could with the night scope.

"BY MR. MASIN:

"Q. In other words, you tried to use the night scope?

"A. Right.

"Q. The observations were no better than they were with your own eyes?

"A. No."

The Supreme Court of the United States in *Franks v. Delaware*, 438 U.S. 154, 57 L.Ed.2d 667, 98 S.Ct. 2674, stated, *inter alia*:

> *"When the Fourth Amendment demands a factual showing sufficient to comprise probable cause, the obvious assumption is that there will be a truthful showing . . . , but surely it is to be 'truthful' in the sense that the information put forth is believed by the affiant as true."*

In the *Franks* case the Supreme Court was confronted with the issue of whether or not a defendant under the

Fourth and Fourteenth Amendments could make an attack on the veracity of the warrant affidavit. The Supreme Court in approving such an attack held:

> "We reverse, and we hold that, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit."

In the case, *sub judice*, the hearing revealed the knowingly made false statements or the reckless disregard for the truth by Officer Brady, where the officer stated that he observed clearly the subject and bales of marijuana with the use of a night scope which illuminated the area.

Both prior to and subsequent to the *Franks* case Florida Courts have recognized that if a defendant demonstrates falsity of any *material* fact in an affidavit supporting the issuance of a search warrant, the warrant

will fall as no probable cause to search would exist. See *LaChance v. State*, (Opinion filed November 15, 1979, Fourth Dsitrict, Case No. 77-1919); *Mason v. State*, (Opinion filed October 4, 1979, First District, Case No. LL-280); *Mathes v. State*, (Opinion filed September 12, 1979, First District, Case No. II-366); *State v. Jacobs*, 320 So.2d 45 (Fla. 2d DCA 1975); *Hudson v. State*, 368 So.2d 899 (Fla. 3d DCA 1979); *Stipp v. State*, 355 So.2d 1217 (Fla. 4th DCA 1978).

In *Stipp v. State, supra*, the Fourth District held:

> "Finally, appellants contend that the motion to suppress should have been granted because the affidavit upon which it was issued contained a number of statements of fact which were shown at the hearing to be incorrect or false. An affidavit for a search warrant would be vulnerable to such an attack if elimination of the false statements denuded the affidavit of sufficient facts to show probable cause. But, if after deletion of those erroneous facts, the affidavit still contains sufficient facts to demonstrate probable cause the warrant should be upheld."

It cannot be contradicted in the instant case that the statement of the affiant, Officer Brady that the night scope used through the viewer's eyes illuminated the area so that the subjects and bales of marijuana were clearly seen was an untrue statement. Corroboration of this perfidy is found in the testimony of Officer Osberg, as set forth above.

The affiant's statement of sufficient facts to show probable cause was that by the use of a night scope the area was so illuminated that he was able to observe clearly both white males and bales of marijuana.

Not only was the affiant unable to see clearly at 1:00 a.m. what the packages or bundles from a distance of approximately 100 yards consisted of; but the so-called white males carrying the packages could not even be identified as to what race they belonged to.

Officer Brady was so overzealous that he recklessly disregarded the truth in order that the Hon. W. C. Williams, III, a Circuit Judge for Palm Beach County would issue a search warrant at 3:02 a.m. based on the perfidious affidavit.

There is no question that Judge Williams relied on the false representation that the affiant using the night scope could clearly see the bales of marijuana. If this false statement were to be excised from the affidavit, as well as the connecting, preceding statement that the affiant observed three white males off-loading at least fifteen large bales of what affiant had observed on previous occasions to be marijuana, the affidavit is barren of sufficient facts to show any probable cause.

From the testimony of Officer Brady, he observed three figures and figures of packages or bundles (T 24, 25). Assume, for the sake of argument, that the foregoing testimony could be made a part of the affidavit. The surveillance in question then accumulated a number of details such as 1) a large boat docked behind the home; 2) a van being driven into the garage of the home; and 3) figures carrying bundles or packages at 1:00 a.m.

from the boat to the residence which could not be further identified.

All of these details taken together cannot rise above the level of mere suspicion. While these observations may create suspicion, particularly among agents engaged in the often competitive enterprise of ferreting out crime, the foregoing observations are not sufficient to establish probable cause for the issuance of a search warrant. *E.g., United States v. Johnstone*, 574 F.2d 1269 (5th Cir. 1978); *Betancourt v. State*, 224 So.2d 378 (Fla. 3d DCA 1969).

In the *Johnstone* case, *supra*, the DEA received a midnight telephone call from an informant that certain people staying at the Roadway Inn, were not allowing the maids to enter their rooms to clean them and that they were paying cash. Further, the caller was suspicious that a drug deal was in the making. An Agent checked the registration of a person in one room who was registered as "Frank Smith". DEA surveillance and investigation revealed that one of the parties under surveillance used addresses in three cities and had sent a letter airfreight from an airport and rented a truck with a load capacity in excess of that needed to carry certain furniture. Another individual under surveillance, who was driving a rented automobile and in the company of a person reported to have connections with drug traffic, *loaded taped-sealed cardboard boxes* into the rented truck.

The Fifth Circuit noted while these observations may create suspicions they were not sufficient either to establish probable cause for a warrantless search or

to provide meaningful corroboration of the informant's report.[4]

In similar manner the observations of figures at night carrying packages or bundles from a boat into a home, which packages or bundles could not even be observed as to what material they were wrapped in or whether they were even tied with rope or string, although appearing of a suspicious nature, never rose above the level of mere suspicion.

A deliberate misrepresentation in an affidavit for a search warrant is considered so serious that the Fifth Circuit in *United States v. Thomas*, 489 F.2d 664 (5th Cir. 1974), held that search warrant affidavits containing misrepresentations made with intent to deceive are invalid whether or not the error is material to a showing of probable cause; but, if the misrepresentations were made unintentionally, the affidavits are invalid only if the erroneous statement is material to establishing probable cause.

Florida has repeatedly held that a statute authorizing the search of a domicile is to be strictly construed and no presumptions of legality are to be invoked in aid of the process under which a proper officer obeying his commands undertakes to satisfy it. *E.g.*, *Hart v. State*, 89 Fla. 202, 103 So.633 (1925); Section 933.18 (Fla. Statutes).

It is conceded that possession of a large amount of marijuana is serious; however, the actions of an officer under color of title deliberately misrepresenting in his

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[4]Three hundred seven pounds of marijuana were found in the cardboard boxes.

affidavit crucial facts necessary to establish probable cause does damage to our system of criminal justice and to our Constitutional right to be free from unlawful searches and seizures.

Accordingly, this Court, albeit reluctantly, should find that the officer in question recklessly disregarded the truth. Further the Court should find that the false statements in the affidavit vitiated the warrant since the erroneous statements were material to the establishment of probable cause.

Respectfully submitted,

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By /s/ Michael A. Masin per R.J.

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, FOURTH DISTRICT

CASE NO. 80-1635

MARK IZZARD, WAYNE LAMAR KACKLEY,
JAMES GILBERT COWHEARD, AND
JACKSON LOCKARD HOWELL,
Appellants,

vs.

STATE OF FLORIDA,
Appellee.

An Appeal from the Circuit Court of the Fifteenth
Judicial Circuit in and for Palm Beach County, Florida

APPELLANTS' INITIAL BRIEF

ARGUMENT

I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING DEFENDANTS' MOTION TO SUPPRESS WHERE THE AFFIDAVIT FOR SEARCH WARRANT i) FAILED TO DEMONSTRATE PROBABLE CAUSE; ii) CONTAINED MATERIAL AND INTENTIONAL MISREPRESENTATION OF FACTS; iii) WAS PREDICATED, IN PART, UPON UNRELIABLE CONFIDENTIAL INFORMANT INFORMATION; AND iv) CONTAINED ILLEGALLY OBTAINED EVIDENCE, ALL IN CONTRAVENTION OF DEFENDANTS' FOURTH AND FOURTEENTH AMENDMENT RIGHTS AS WELL AS THEIR RIGHTS UNDER ART. 1, §12, OF THE FLORIDA CONSTITUTION.

The defendants contend that the affidavit for the search warrant pertaining to the house[7] was insufficient on its face as a matter of law to constitute probable cause under this Court's case of *Alvarez v. State*, ____ So.2d ____ (Fla. 4th DCA 1981), Case No. 79-1546, January 7, 1981 [1981 FLW 179). Before analizing the *Alvarez* case on the matter of the failure of the affidavit to establish probable cause, the defendants will discuss

[7]As noted by the trial court, all parties agree that if the first warrant for the house was legally insufficient, the second warrant for the boat also must fall (T 235).

the portion of the affidavit which refers to the "confidential source."

Unreliable Confidential Informant Information

Initially, the defendants submit that the information appearing in the affidavit for search warrant which was derived from a "confidential source", must be rejected as insufficient as a matter of law for the reason that it is not predicated on any showing of reliability of either the informant or how the informant gained his information. *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584 (1969); *Alvarez v. State, supra; Hansen v. State*, 385 So.2d 1081, 1084-1085 (Fla. 4th DCA 1980); *Pesce v. State*, 288 So.2d 264, 266 (Fla. 4th DCA 1974). See also, *Davis v. State*, 376 So.2d 479, 480 (Fla. 1st DCA 1979); *State v. Adams*, 355 So.2d 194, 195 (Fla. 1st DCA 1978); *Davis v. State*, 346 So.2d 141, 142 (Fla. 1st DCA 1977); *State v. Bond*, 341 So.2d 218, 219-220 (Fla. 2d DCA 1976); *Johnson v. State*, 339 So.2d 667, 669 (Fla. 2d DCA 1976).

The affidavit in the case at bar fails to even make a conclusory allegation that the informant was reliable, let alone demonstrate the informant's credibility or the reliability of his information. Accordingly, as in *Alvarez, supra*, "the portion of the affidavit which refers to the confidential informant is insufficient as a matter of law because it fails to establish the reliability of the confidential informant."

Even assuming that the "confidential source" was the "neighbor" and that the information could somehow be sanitized of the *Aguilar-Spinelli* deficiencies, this

information established only the barest of suspicion, far short of probable cause. The informant information appearing in the affidavit and summarized in the Statement of Facts, *supra*, consists merely of the docking of the vessel "Nerrissa" at the rear of the residence, a van pulling in the garage, the garage door being shut, and at least two white males being observed in and out of the residence while the "Nerrissa" was docked at the rear of the residence (T 137, 222).

Absence of Probable Cause

Stripped to its lawful contents, the affidavit in question establishes that the affiant saw three "white" males[8] carrying from the boat to the house several "large bales" of what the affiant believed to be marijuana, based on his experience and training (T 137, 222). It is submitted that the affiant's conclusion that the bales contained marijuana is based on no more than hunch, suspicion, and sheer guesswork of the kind consistently

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[8]The testimony at the hearing on the Motion to Suppress established that neither officer could determine the sex of the "figures" observed (T 34, 53-54). It is submitted that the affidavit in support of the search warrant must be examined within its "four corners" and may not be supplemented by testimony to bolster the insufficiency appearing on the face of the affidavit. *Swartz v. State*, 316 So.2d 618 (Fla. 1st DCA 1975); *State v. Bond*, 341 So.2d 218, 219 (Fla. 2d DCA 1976); *McClellan v. State*, 359 So.2d 869, 873 (Fla. 1st DCA 1978). It is further submitted that even if the testimony at the hearing in the case at bar is utilized, it could not cure the affidavit's fatal insufficiency regarding the establishment of probable cause. The purpose of the testimony was to demonstrate the material misstatements contained in the affidavit. *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674 (1978). See text, *infra*.

rejected by this Court and the courts of Florida. *Bailey v. State*, 319 So.2d 22, 26 (Fla. 1975); *Alvarez v. State*, *supra*; *Hansen v. State*, *supra* at 1086; *Pomerantz v. State*, 372 So.2d 104, 110 (Fla. 3d DCA 1979); *Carr v. State*, 353 So.2d 958, 959 (Fla. 2d DCA 1978); *Harris v. State*, 352 So.2d 1269, 1270 (Fla. 2d DCA 1977); *Shepherd v. State*, 343 So.2d 1349, 1350 (Fla. 1st DCA 1977).

It is submitted that this Court's most recent decision in *Alvarez v. State*, *supra*, is dispositive. There, the afidavit for search warrant was held to be insufficient as a matter of law where, after excising the unreliable confidential informant material, it alleged in essence, certain facts strikingly analogous to the facts of the case, *sub judice*. For example, it stated that a Sgt. McCracken went to the residence directly south of the motor vessel "My Pretty Lady" (which boat was docked behind a house) and with the aid of binoculars observed two white males unload three bales approximately two feet by two feet, wrapped in black plastic. In addition, the affiant came to the observation point; observed the vessel and another officer on observation advised the affiant that he recognized the vessel "My Pretty Lady" as the same vessel he had observed from an aircraft while flying over the Bahamas on the prior day and the vessel had ben headed east.

The affiant in *Alvarez* set forth in his affidavit that he had been employed for the past seven years and one month in the Palm Beach County Sheriff's Office and that he had been assigned to the Vice Intelligent Unit for the past five years, that he was a graduate of the Bureau of Narcotics and Dangerous Drugs School and has attended numerous drug schools and seminars

and "made well over 100 arrests in these past five years as a Narcotic Officer."

From the foregoing it can be seen that the *Alvarez* affidavit, unlike the one in the case at bar, even went further in alleging that the bales were wrapped in black plastic; the vessel was seen the prior day in the Bahamas; and the affiant had far greater narcotics experience.

Based on the information, observations and confidential informant the affiant stated in the *Alvarez* affidavit that he "believes there is in fact illegal narcotics and/or dangerous drugs in the house to be searched."[9]

This Court in *Alvarez* rejected both the affiant's prior experience in making "well over 100 arrests" in drug cases (as well as the above-quoted Addendum stating that the officers "were convinced on the basis of their knowledge of the facts and their experience as police officers that these bales must contain marijuana")

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[9]It is interesting to note that in *Alvarez, supra*, the issuing Magistrate (according to the record in *Alvarez*), included an Addendum to the search warrant when he issued it; this Addendum appears in the record on appeal in this Court's *Alvarez* case (See R. 467 of the *Alvarez* record on appeal) and states as follows:

> "Another fact which I recall specifically which I do not see included in Sergeant Myers' report is the very strong belief of the officers that the bales which Sergeant McCracken observed being off-loaded could be nothing else other than marijuana; even though they could not see the contents of the bales they were convinced on the basis of their knowledge of the facts and their experience as police officers that these bales must contain marijuana."

as establishing probable cause for the issuance of the search warrant. Similarly, in the case at bar, Affiant Brady's "ten (10) previous occasions" of observing bales of marijuana cannot suffice to establish probable cause. The fact remains that Sergeant McCracken in *Alvarez* and Detective Brady in the case at bar merely had a suspicion that the bales contained marijuana.

Alvarez as well as the decisions to be discussed, *infra* reveal that *this type of suspicion is insufficient to supply probable cause.*

In *Hansen v. State, supra*, the officers set up surveillance of the defendant's house after having been informed that marijuana was being stored and sold there. The officer observed activities from the residence next door by looking over a chain link fence and hedge and observed two men whom he could not identify carrying two "bundles". The officer testified that "he suspected the bundles contained marijuana, although he stated that he never actually saw any marijuana." In holding that there was no probable cause to believe the "bundles" contained marijuana, this Court stated:

> "[T]he police did not have probable cause to believe that the 'bundles' they observed were the 'fruits', 'instrumentalities', or 'evidence' of a crime. [Officer] Treutle testified that he never saw any marijuana, only that he suspected that the bundles contained marijuana. *Recent decisions have held that a police officer's observation of the outer packing of a suspected parcel of marijuana, standing alone, is insufficient to constitute probable cause, Harris v. State,* 352 So.2d 1269, 1270 (Fla. 2nd DCA 1977); *Carr*

> *v. State*, 353 So.2d 958, 959 (Fla. 2nd DCA 1978). *The mere observation of such parcels could at most raise a suspicion of wrongdoing.* Additional specific information was needed to escalate this supicion to probable cause. As previously stated, the record here indicates that none of the officers had any information concerning specific drug transactions. Furthermore, there is nothing to indicate that the parcels were packaged in a manner that is customary to marijuana packaging in general. This being the case, and no marijuana being plainly visible, the police did not have the requisite probable cause to make an arrest or search. 385 So.2d at 1086.

Precisely the same can be said in the case at bar. Since no marijuana was "plainly visible", as in *Hansen*, Detective Brady's bare assertion that the bales he observed here contained marijuana based on his previous experience with marijuana bales amounts to no more than conjecture. *Accord, Alvarez v. State, supra.*

Detective Brady's guess cannot be bootstrapped to probable cause based on his assertion that he has "observed packaged bales of marijuana" on "previous occasions" (T 137, 222). In *Alvarez, supra*, this Court rejected the affiant-officer's surmise that the bales there contained marijuana based on the following:

> "Your affiant is a Deputy Sheriff with the Palm Beach County Sheriff's Office and has been so employed for the past seven years and one month. Further that your affiant has

> been assigned to the Vice Intelligence Unit for the past five years and that your affiant is a graduate of the Bureau of Narcotics and Dangerous Drugs School and has attended numerous drug schools and seminars. Further, *your affiant has made well over 100 arrests in these past five years as a Narcotic Officer.*

This "boiler-plate" of prior narcotics arrests and familiarity with marijuana is no different from Detective Brady's insufficient statement that "[o]n at least ten (10) previous occasions, your Affiant has observed packaged bales of marijuana." The law rightfully condemns such guesswork by police officers who are "engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 68 S.Ct. 367, 926 L.2d. 436.

In *Bailey v. State*, 295 So.2d 133, 136 (Fla. 4th DCA 1974), *rev'd. on other grds.*, 319 So.2d 22, 26 (Fla. 1975), this Court held that a search of a plastic bag was without probable cause where "whatever was contained in that bag was not 'fully disclosed and open to the eye and hand'." The Florida Supreme Court expressly approved this portion of this Court's holding. 319 So.2d at 26.

Similarly, in *Pomerantz v. State, supra*, the Third District held that where it was necessary for officers to slit open a black plastic bag in order to discover what the officers suspected to be marijuana, the opening of the bag was held to be without probable cause. 372 So.2d at 110.

In *Carr v. State, supra*, cited by this Court in *Hansen*, the Second District held there was no probable cause to seize two opaque hand-rolled cigarettes even though the officer testified that "when he saw the two cigarettes through the window he *'knew' they were marijuana cigarettes* . . . . " 363 So.2d at 959. The Court observed that the officer could not really see any marijuana and "he could not *know* what material was within the paper." *Id.*

Similarly, in *Harris v. State, supra*, also cited in *Hansen*, the Second District held an officer's seizure of a plastic bag containing marijuana was without probable cause where the officer could not see what the plastic bag contained until he removed it from the defendant's pocket. The Court observed: "the fact that the officer knew that marijuana was commonly carried in plastic bags gave rise to, at most, a mere suspicion that the bag appellant was seen putting into his pocket contained marijuana." 352 So.2d at 1270. This holding is also dispositive here.

Finally, in *Shepherd v. State, supra*, the First District held:

> "When the officer searched the plastic bag in Shepherd's billfold, he did so because of his suspicion that it might contain marijuana. The fact that Shepherd had a small plastic bag in his billfold did not constitute probable cause for a warrantless search of his personal effects. The officer was acting upon bare suspicion alone. 343 So.2d at 1350.

In all of these cases, the fact that a trained police officer with obvious narcotics experience observed opaque bundles, cigarettes, or bags, did not constitute the requisite probable cause for a search. The affidavit in the case at bar can no more provide probable cause than any of the cited cases where experienced police officers simply make an observation of a parcel, bundle, bale, or bag. The affidavit on its face fails to establish probable cause to believe the bundles in the case at bar contained marijuana and the trial court erred in denying defendants' Motion to Suppress.

Material False Statements Void Warrant

Yet another basis exists to vitiate the warrant's legality. As noted earlier, the trial court clearly *based* its ruling on Affiant Brady's ability, with the use of the night scope, to "clearly"[10] see the bales:

> "Then your affiant was aided in the observation with a night scope, and the bales of marijuana *were clearly seen* by the affiant. *It turns on that* and I realize as I have just said earlier that this may not be the correct ruling and I might get reversed." (T 24) (Emphasis added).

It is submitted that Affiant Brady's sworn allegations in his affidavit that by using the night scope he could "clearly" see three white males and the bales of marijuana

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[10]Specifically, the affidavit states: "Your Affiant was aided in these observation[s] with the use of a Startron night scope, which through the viewer's eye illuminates the area that is observed, *so that said subject and bales of marijuana were clearly seen by your Affiant.*" (T 137, 222).

constituted material misstatements of fact that deceived both the issuing magistrate and the trial court to issue and uphold respectively the search warrant (T 137, 222).

Affiant Brady's false statements were revealed by his own testimony at the hearing on the Motion to Suppress as well as the testimony of Patrolman Osberg. First, the affidavit alleges that the affiant "observed three white males . . . . " (T 137, 222). The testimony at the hearing from *both* Detective Brady and Patrolman Osberg reveals that the sex (indeed, even the *race*) of the "figures" could not be determined with or without the night scope (T 34, 53-54).[11]

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[11]Brady testified at the hearing as follows:

"Q Now, I want to go back to one other area, the night scope you were looking through. (T 53)

"A Yes, sir.

"Q Could you even tell from looking through it whether the people you saw were white people or black people or oriental people or anything like that?

"A No, sir.

"Q All you could see was figures, is that a fair statement? (T 54)

"A Yes, sir.

"Q Figures of persons, figures of bundles?

"A Yes, sir.

"Q Or packages or what have you, is that a fair statement?

"A Yes, sir."

Brady testified further that he could not tell if the packages had handles, were wrapped in rope or twine, or, indeed anything else about the packages other than their shape (T 49-50, 58). In fact, all he could see with the nightscope were "[f]igures of persons, figures of bundles." (T 54).

Since his testimony revealed that he could not even determine if the packages he saw were wrapped in burlap bags, plastic bags, or cardboard boxes, certainly his sworn affidavit that the night scope illuminated the area "so that said subjects and bales of marijuana were clearly seen by your Affiant . . . ", was false (T 137, 222).

The falsity of Brady's affidavit is also demonstrated by Patrolman Osberg's testimony: Osberg could see better with his own eyes than with the night scope (T 32, 33). Osberg using his naked eye still could not tell what was in the parcels; only, that he could discern "something like large bundles" and figures carrying something. (T 32-34). He could not determine what kind of wrapping the parcels had, whether they were in plastic, burlap, newspaper, carpet; they were "[j]ust large bundles" (T 35).

Patrolman Osberg was in the immediate vicinity of Detective Brady when these observations were made (T 35). It thus becomes obvious that Brady's sworn affidavit asserting that the "bales of marijuana were clearly seen" by using the night scope is patently false. Without this falsehood, the affidavit merely asserts what the testimony so blatantly reveals: "just figures carrying something" and "[f]igures of persons, figures of bundles" (T 34, 54).

In *Franks v. Delaware*, 438 U.S. 154, 155, 98 S.Ct. 2674, 2676, 57 L.Ed.2d 667, 672, the United States Supreme Court held:

> "We reverse, and we hold that, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the Defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit."

This Court has consistently recognized and applied the *Franks* rule. Thus in *State v. Bogard*, 388 So.2d 1296, 1297 (Fla. 4th DCA 1980), this Court affirmed a suppression order. In *Bogard*, Judge Glickstein concurring specially stated: "A search warrant may be found invalid if the statements contained in an affidavit upon which the warrant was based are found to be erroneous." See also, *Stipp v. State*, 355 So.2d 1217, 1218-1219 (Fla. 4th DCA 1978) when the Court held: "An affidavit for a search warrant would be vulnerable to . . . an attack

if elimination of the false statements denuded the affidavit of sufficient facts to show probable cause."

Therefore, in applying the *Franks* test, the false and reckless statements contained in the affidavit concerning the *clear* observation of the three white males and the bales of marijuana must be excised from the affidavit. Thus the only facts left in the affidavit are 1) a large boat docked behind the home; 2) a van which was pulled into the garage area of the premises searched and the door being shut, 3) a second sighting of a van stopping at the permises in question (T 137, 222).

All of the foregoing details barely rise if at all above the level of mere suspicion for the statement by the affiant that he clearly observed bales of marijuana when deleted by the compulsion of the mandate in the *Franks* case leaves no showing whatsoever of probable cause. Quite simply, Officer Brady was so overzealous that he recklessly disregarded the truth in order that the issuing magistrate would grant the search warrant.

Since, in the trial court's own words, the issuance of the search warrant "turns on" affiant Brady's ability to "clearly" see the bales through the night scope, the *Franks* test has been met and the Motion to Suppress should have been granted. See also, *United States v. Character*, 568 F.2d 442 (5th Cir. 1978); *United States v. Thomas*, 489 F.2d 664 (5th Cir. 1974), (T 24).

Illegally Obtained Evidence

Finally, even if the night scope statement is deemed true the *very use* of the device constituted an illegal,

warrantless search under Florida law, the fruits of which cannot be utilized to obtain a search warrant. *State v. Barnes*, 390 So.2d 1243 (Fla. 1st DCA 1980). In *Barnes*, the police had been informed that marijuana was growing behind defendant Barnes' mobile home. Using a telescope, a deputy sheriff, from the vantage point of a neighbor's yard, observed and identified the plants as marijuana. Without obtaining a warrant, the officers seized the plants, the State contended that no warrant was necessary as this was a "plain view" seizure. The First District rejected this contention holding:

> "The plain view exception to the warrant requirement cannot in our opinion be used to justify the seizure of evidence clearly identifiable only through a telescope, the *warrantless use of which constitutes an intrusion into an area not reasonably expected to be exposed to the public.* 'If government agents have probable cause to suspect criminal activity and feel the need for telescopic surveillance, they may apply for a [search] warrant.' Otherwise, we conclude such conduct is an intrusion into an area in which there is a reasonable expectation of privacy,[12] accomplished by special equipment

[12]Regarding the defendants' expectation of privacy in the case at bar, i.e., their standing, neither the State nor the trial court challenged the standing of any of the defendants. Accordingly, no evidence was elicited on this issue. It is submitted that first, the State has waived any objection based upon a purported lack of standing of any individual defendant; secondly, even if standing can be challenged for the first time on appeal, the proper procedure would be for this Court to remand this cause to the trial court to enable the defendants to establish their reasonable expectation of privacy in the premises. Such was done in United States v. Salvucci,

not in general use. [Citations omitted.]

The court held further that "the public to whom something is knowingly exposed must be 'the ordinary run of people, not those who happen to possess powerful and sophisticated devices and the curiosity to use them to spy on their fellows.' "

The exact same rationale applies in the case at bar where Detective Brady utilized a sophisticated night scope to allegedly enable him to "clearly" see the purported bales of marijuana. The very use of that device constituted a warrantless, illegal search. *State v. Barnes, supra.* As the Florida Supreme Court recently held in *State v. Morsman*, ____ So.2d ____ (Fla. 1981), Case No. 54,632, January 8, 1981 [1981 FLW 27], "A preceding illegal search cannot furnish probable cause to support a subsequent search warrant." *Id.* at 28. See also, *Purcell v. State*, 325 So.2d 83 (Fla. 1st DCA 1976).

(Footnote 12 Continued)

____ U.S. ____, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980); *Priori v. State*, 386 So.2d 618 (Fla. 1st DCA 1980); *Coster v. State*, ____ So.2d ____ (Fla. 3d DCA 1980), Case Nos. 79-1839-41, December 2, 1980 (1980 FLW 2273).

Adverting, again to the State not raising the issue of standing, this Court should note that the Supreme Court of Florida in *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973), stated:

> "As to those cases in which trial has already begun or in which verdict or judgment has already been rendered, this opinion shall not be applicable, unless the applicability of the comparative negligence rule was appropriately and properly raised during some stage of the litigation."

In *Morsman, supra*, the deputy walked around the house and saw marijuana plants growing in the backyard just as the neighbors had reported. These plants could not be seen from the street or the front yard although the yard was not fenced in. The Supreme Court of Florida recognized that the backyard of a residence is more private than the front "because passersby cannot generally view this area." *Id.* This rationale applies to the case at bar where the activity observed took pace "at the rear of 721 Marine Drive." (R 222).

To summarize, the affidavit for search warrant was insufficient on its face to establish probable cause where it contained i) insufficient allegations regarding the confidential informant, *Aguilar v. Texas, supra; Spinelli v. United States, supra; Alvarez v. State, supra; Hansen v. State, supra;* ii) was based on mere suspicion, *Alvarez v. State, supra; Hansen v. State, supra;* iii) it contained material misstatement of fact, *Franks v. Delaware, supra; State v. Bogard, supra;* and iv) it was itself predicated on an illegal, warrantless search by the use of the night scope. *State v. Barnes, supra; State v. Morsman, supra; Purcell v. State, supra.* Accordingly, the trial court erred in denying defendants' Motion to Suppress.

II

SECTION 893.135, FLORIDA STATUTES IS UNCONSTITUTIONAL IN THAT IT VIOLATES THE PRIVILEGE AGAINST SELF-INCRIMINATION; INFLICTS CRUEL AND UNUSUAL PUNISHMENT; IMPOSES A PENALTY FOR ASSERTING THE PRIVILEGE AGAINST SELF-INCRIMINATION: CREATES A SEPARATE AND DISTINCT PUNISHMENT FOR THE FAILURE TO GIVE "SUBSTANTIAL ASSISTANCE"; VIOLATES EQUAL PROTECTION OF LAWS AND DUE PROCESS OF LAW: ALL OF THE FOREGOING IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS AND SAID STATUTE FURTHER VIOLATES THE SEPARATION OF POWERS DOCTRINE OF THE STATE CONSTITUTION AND IS UNCONSTITUTIONALLY VAGUE, INDEFINITE, ETC. AND ESTABLISHES A FELONY WITH A SEVERE SENTENCE WITHOUT PROOF OF ANY *MENS REA*

Section 893.135, Florida Statutes, the Drug Trafficking Statute, is unconstitutional for the reasons set forth in Point II and said statute violates Art. I, §§ 2, 4, 9, 17, 21, and Art. II, § 3, Florida Constitution, and the First, Fifth, Eighth, Ninth and Fourteenth Amendments of the Federal Constitution.

As noted above, the constitutionality *vel non* of the statute in question is presently pending before the Supreme Court of Florida in *State v. Benitez*, Case No.

57,834. Additionally, there are numerous cases pending in the Supreme Court of Florida as well as in the District Courts of Appeal of Florida awaiting the decision in *Benitez*. In the event the Supreme Court holds the statute to be unconstitutional, the appellants specifically request that the legal reasoning advanced by the Supreme Court be adopted by reference, herein.

Also, inasmuch as this point will be determined by the Supreme Court of Florida, the defendants will make a more concise argument on the reasons for holding the statute invalid rather than explore each argument in depth.

First, an offensive subsection of the statute reads as follows:

> "(3) The state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if he finds that the defendant rendered such substantial assistance."

This section of the statute is so essential to the statutory scheme of the Legislature in promulgating

the trafficking statute that the holding of a subsection unconstitutional will cause the entire statute to fall because the subsections cannot be held to be severable.

Violation of Constitutional Right to Silence And Protection Against Self-Incrimination

A person convicted under the statute must serve a harsh and severe mandatory minimum jail term without any parole relief, or reduction of sentence. The statute makes the one exception that a person who provides "substantial assistance" in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators or principals, may have his sentence reduced if the prosecutor moves the sentencing court to reduce or suspend the sentence and the arresting agency is given an opportunity to be heard in reference to the procedure.

The Court thereafter may reduce or suspend the sentence if the sentencing judge finds that the defendant rendered substantial assistance. Such a statute figuratively and literally opens a can of worms. For the convicted individual must necessarily give information which could be self-incriminatory without any grant of immunity.

In other words, the statute compels a waiver of immunity by in effect threatening the carrying out of a mandatory minimum sentence unless the convicted defendant testifies against his own interest. See *Murphy v. Waterfront Commission of New York*, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1974). *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 625, 17 L.Ed.2d 574.

It cannot be contradicted that a convicted defendant who renders "substantial assistance can only tend to furnish a link in the chain of evidence." *Hoffman v. United States*, 341 U.S. 479, 81 S.Ct. 814, 95 L.Ed. 1118 (1951).

Thus, in effect, the defendant is punished by his silence and rewarded only if he talks. Such sentencing procedures are unconstitutionally coercive. E.g., *Thomas v. United States*, 368 F.2d 941 (5th Cir. 1966); *United States v. Rodriguez*, 498 F.2d 302 (5th Cir. 1974); *United States v. Rogers*, 504, F.2d 1079 (5th Cir. 1974).[13]

The Statute Inflicts Cruel and Unusual Punishment

In addition to the constitutional shortcomings of the statute as pointed out, *supra*, the statute in effect makes it a punishable crime to assert one's privilege against self-incrimination which in turn, in effect, creates a crime for one's assertion of his privilege against self-incrimination.

The Statute Violates the Equal Protection Clauses of the State and Federal Constitutions As Well as the Due Process Clauses

Again, the defendants would adopt all reasoning advanced by the Supreme Court of Florida in the event they declare the statute unconstitutional as being in violation of the equal protection of the laws or in violation of due process of law.

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[13] By giving compelled information, the convicted defendant would not enjoy any double jeopardy protection from other drug charges.

A serious equal protection flaw to the statute is that it only rewards one who renders "substantial evidence to the State" in apprehension of those involved in drug trafficking. Thus, it is immediately apparent that the Legislative purpose and scheme in promulgating the statute, that is to reduce the heavy flow of drug trafficking, is frustrated by the provision in question.

For example, the convicted defendant in the lowest echelon of a criminal organization would have to serve a mandatory minimum sentence and yet would not have at hand the type of information needed to give the authorities "substantial assistance" that would result in a reduction of sentence.

For it is the so-called "ring leader" or other higherups who will be the person in the best situation to reap the benefits of the subsection, while the person whose involvement in the crime charged is merely peripheral and who is the least blameworth will be the person most likely to be punished by it.

It is patent that the legislature never intended such a result and the leniency provisions of the statute are clearly violative of the equal protection of the laws clauses of the State and Federal Constitutions as well as the Due Process Clauses.

The Statute Violates the Separation of Powers Doctrine of the Florida Constitution As Well As Being Vague, Indefinite, Uncertain, Overbroad and Arbitrary

First, as to the separation of powers in violation of Article 2, §3, Florida Constitution, the statute after withdrawing any parole eligibility under Section 2,

thereof, or sentencing discretion from the judiciary, attempts to delegate sentencing discretion to the executive branch by vesting in the state attorney the sole authority to move the sentencing court to reduce or suspend sentences without standards or guidelines.

All of this leaves the statute indefinite, uncertain, vague, etc., and leaves what is tantamount to judicial discretion to the prosecutor in violation of Article 2, Sections 2 and 3, Article 5, Subsection 1 and 17 of the Florida Constitution.

A reading of subsection 3 of the statute transfers basic control over the sentencing function to the State Attorney, thus the legislature has delegated to the executive branch (i.e., State Attorney) the ultimate sentencing function which constitutionally must vest exclusively in the judicial branch.

The Courts under our Constitution can never have their judicial powers stiffled so that a reduction of sentence can only be initiated at the instance of a prosecutor.

Furthermore, as to the "substantial assistance provision" to escape the mandatory minimum sentence, such provision lacks sufficient definiteness, standards or guidelines. It has the further infirmity of allowing the individual police officer the statutory right to preclude the reduction of sentence, or to enable such a reduction.[14]

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[14]After the foregoing argument was completed, the undersigned has read in the February 13, 1981, edition of the Miami Herald that the Drug Statute in question has been upheld. Notwithstanding the upholding of this statute, the defendants do not in any wise waive any of the constitutional issues raised.

CONCLUSION

Based upon the foregoing argument, citation of authority and policy, the defendants respectfully request this Court to reverse the judgments and sentences entered below and remand this case with directions that the defendants be discharged.

(Footnote 14 Continued)

Defendants would respectfully request a decision on this issue in order that they may proceed directly to the Supreme Court of the United States on the Federal Constitutional issues.

Motion to Dismiss or Affirm

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CASE NO. 81-2084

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MARK IZZARD, WAYNE LAMAR KACKLEY, JAMES GILBERT COWHEARD, JACKSON LOCKARD HOWELL,

Appellants,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

APPELLEE'S MOTION TO AFFIRM

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QUESTIONS PRESENTED

A. Whether Section 893.135, Florida Statutes is unconstitutional.

B. Whether the Defendants present any substantial question under Franks v. Delaware, 438 U.S. 154 (1978).

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PREFACE

The Appellants were the Defendants in the Florida trial court and the Appellants in the Florida Fourth District Court of Appeal below. The State of Florida was the prosecution in the trial court and the Appellee in the Fourth District Court of Appeal. In this brief, the parties will be referred to as they appeared in the trial court below.

The following reference is made in this brief:

(A) For the Appendix to the brief of the Appellants.

I

OPINIONS BELOW

The opinion of the Florida Fourth District Court of Appeal affirming the trial court's finding that Section 893.135 Florida Statutes is constitutional is reported at Izzard v. State, 412 So.2d 501 (Fla. 4th DCA 1981). There is no official reporter for citation to this opinion.

II

JURISDICTION

The Defendants claim jurisdiction herein based upon 28 U.S.C. 1257(2).

III

ARGUMENT

The State is in receipt of the Defendant jurisdictional statement on appeal from the Fourth District Court of Appeal of Florida, in which the court affirmed the trial court's finding that Section 893.135 Florida Statutes is constitutional. See, State v. Benitez, 395 So.2d 514 (Fla. 1981); see, also, State v. Thebeau, 405 So.2d 973 (Fla. 1981); State v. Newman, 405 So.2d 971 (Fla. 1981); State v. Leicht, 402 So.2d 1153 (Fla. 1981); State v. Werner, 402 So.2d 386 (Fla. 1981); State v. Yu, 400 So.2d 762 (Fla. 1981). The Defendants now seek a second review in this Court. The Defendants claim that the mandatory penalties under Section 893.135(1) and the provision for mitigation in Section 893.135(1) in the event of a defendant's "substantial

assistance" are violative of the constitutional protections afforded by the Due Process clause; the Equal Protection clause and the prohibition against self-incrimination and unusual punishment. The Defendants also claim that the Florida Courts have committed constitutional error under Franks v. Delaware, 438 U.S. 154 (1978).

A. NO SUBSTANTIAL FEDERAL QUESTION

Each of the Defendants' constitutional complaints are easily rejected based upon settled principles of federal constitutional analysis. In Roberts v. United States, ___U.S.___, 100 S.Ct. 1958 (1980) the defendant, a heroin dealer, refused to cooperate with police in further investigation of narcotics traffic in his community. 100 S.Ct. at 1362. The trial court therefore meted out a more severe sentence than if the defendant had cooperated. Id. In sustaining the more severe sentence the Roberts court held, 1) that part of the defendant's rehabilitation would be cooperation with law-enforcement in exposing crime in his community and 2) that there was no record basis for any claim of self-incrimination or coercion. 100 S.Ct. at 1363-1365. As in Roberts, in the case at bar there

is not a shred of evidence that the Defendants had been compelled or coerced to do anything. Indeed, under settled principles of constitutional analysis, to infringe upon the Fifth Amendment prohibitation, the testimony must be both compelled and used against the defendant. See, Lefkowitz v. Cunningham, 431 U.S. 801, at 804-805 (1977). Without use against the defendant, there is no prohibition under the Fifth Amendment. See, United States v. ManDujano, 340 U.S. 367 (1951). Furthermore, the central issue under the Fifth Amendment is not whether a Defendant has a difficult choice but whether he has a choice. See, McGautha v. California, 402 U.S. 183, at 212-213 (1971); North Carolina v. Alford, 400 U.S. 25 (1970); Brady v. United States, 397 U.S. 742 (1970). The present statute presents the Defendants only with a

difficult choice and is therefore not in violation of any constitutional precepts.

The Defendants' claims that Section 893.135 denies due process and the statute imposes cruel and unusual punishment are similarly wholly without merit. In Bordenkircher v. Hayes, 434 U.S. 357 (1978) the prosecutor in pretrial plea bargaining had told the defendant, the defendant's plea to a term of five years in prison would be acceptable, but that if the defendant did not plead guilty, that he, the prosecutor, would seek a grand jury indictment against the defendant as an habitual offender, which required a mandatory life sentence. 434 U.S. at 359. The defendant in Bordenkircher chose not to plead guilty and was subsequently convicted and sentenced to life. Id., at 360. In framing the issue, the Bordenkircher court specifically held that:

"As a practical matter, in short, this case would be no different if the grand jury had indicted Hayes as a recidivist from the outset, and the prosecutor had offered to drop that charge as part of the plea bargain." [Emphasis added].

Id.

Addressing the principles which are clearly controlling herein, the court further opined that:

"By hypothesis, [a] plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after trial. See ABA Standards Relating to Pleas of Guilty §3.1 (1968); Note, Plea Bargaining and the Transformation of the Criminal Process, 90 Harv.L. Rev. 564 (1977). Cf. Brady v. United States, supra, 397 U.S., at 751, 90 S.Ct. at 1470; North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162.

While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant's assertion to his trial rights, the imposition of these difficult choices [is] an inevitable--and permissible--attribute of any legitimate system which tolerates and encourages the negotiation of pleas." [Emphasis added].

Id. at 364.

Relying upon its decision in Bordenkircher, in Corbitt v. New Jersey, 439 U.S. 212 (1978), the court also found no constitutional disability in circumstances analogous to those possible under the statute in the case at bar. In Corbitt through a complex New Jersey system of homicide statutes, if the defendant went to trial and was convicted of first degree murder the trial judge must sentence him to life imprisonment. 439 U.S. at 214-215. If the defendant pleaded nolo contendere to the trial court and the trial court accepts his plea he could be sentenced to a sentence of "not more than 30 years" or life in the complete discration of the trial court. Id. at 215-217. The Corbitt defendant chose to go to trial and was convicted of a first degree murder offense and sentenced to the mandatory life term under the statute.

Id. In rejecting the defendant's multiple constitutional claims under the Fifth, Sixth, and Fourteenth Amendments, the Corbitt court held that:

"As did the New Jersey Supreme Court, we disagree. The cases in this Court since Jackson have clearly established that not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid. Specifically, there is no per se rule against encouraging guilty pleas. We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea. The plea may obtain for the defendant not only "the possibility or certainty. . .[of] a lesser penalty then the sentence that could be imposed, after a trial and a verdict guilty . . .," Brady v. United States, 397 U.S. 742, 751, 90 S.Ct. 1463, 1470, 25 L.Ed. 2d 747 (1970), but also of a lesser penalty than that required to be imposed after a guilty verdict by a jury."

The Corbitt court concluded its analysis, relying upon Bordenkircher thus:

"While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable '--and permissible--' attribute of any legitimate system which

tolerates and encourages the negotiation of pleas. Chaffin v. Stynchocombe, supra, at 31 (93 S.Ct. 1977). It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutional legimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty."

Id. at 218-219.

In the case at bar, after their convictions, sentences and appeals, the Defendants have two choices under the statute. They may either serve the lawful term of their imprisonment or they may seek the benefit of mitigation of their sentences by substantial cooperation with the authorities. Under Corbitt, Bordenkircher and Brady and its progeny, there is simply no constitutional disability in merely providing the Defendants with the choice of "grim alternatives" upon their convictions for trafficking in narcotics in Florida.

Trafficking in narcotics is indeed a

heinous crime, which is tearing at the very fabric of our society. Clearly the legislative purpose in providing more severe penalties for such a crime has a rational basis and therefore is manifesting devoid of any defect under an equal protection claim. See, analysis, in, Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976); Marshall v. United States, 414 U.S. 417, at 421-422 (1974); see also, Albernaz v. United States, ___U.S.___, 100 S.Ct. 1137 (1981). Additionally, the severity of the penalties in Section 893.135 also cannot be seriously assailed under any theory under the Eighth Amendment. See, Rummel v. Estelle, ___U.S.___, 100 S.Ct. 1133 (1980). The extent and nature of crimes and their punishment is an exclusive legislative perogative into which no court may intrude. Id.

B. NO VIOLATION OF FRANKS V. DELAWARE.

Under Franks v. Delaware, 438 U.S. 154 (1978) a defendant must make a preliminary showing that an affiant for a warrant has made a false statement knowingly and intentionally or with reckless disregard for the truth. After this preliminary showing and if the false statement is necessary to show probable cause, there must be an evidentiary hearing. In the present cause the Defendants failed both to make the preliminary showing and to show that any allegedly false statement was necessary to show probable cause. The search warrant was easily predicated upon both an informant and the observations of the police officers. The Defendants' complaint furthermore centers upon such an academic discrepancy so as to be insubstantial and harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18 (1967).

V

CONCLUSION

WHEREFORE, upon the foregoing, the Appellee, THE STATE OF FLORIDA, prays that this Honorable Court will enter its order affirming the judgment below.

RESPECTFULLY SUBMITTED, on this _____ day of _____, at Tallahassee, Leon County, Florida.

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Appellant's Reply Brief

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CASE NO. 81-2084

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MARK IZZARD, WAYNE LAMAR KACKLEY, JAMES GILBERT COWHEARD, JACKSON LOCKARD HOWELL,

Appellants,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

REPLY TO APPELLEE'S MOTION TO AFFIRM

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QUESTIONS PRESENTED

(As to Constitutionality Vel Non of Statute)

I

Whether the Florida Drug Trafficking Statute imposing a mandatory minimum sentence, without parole, on a convicted defendant for the purpose of compelling him to provide "substantial assistance" coerces a defendant into relinquishing his Fifth Amendment privilege against self-incrimination by denying him leniency unless he provides information which is self-incriminatory with no offer of immunity.

II

Whether the Florida Drug Trafficking Statute Violates the Equal Protection Clause of the Fourteenth Amendment where a convicted defendant who can not provide "substantial assistance" is ineligible to receive a reduction or suspension of his sentence; whereas, a convicted defendant who is more culpable and in a higher echelon of a criminal organization is able to provide "substantial assistance" and thereby have his sentence reduced or suspended.

III

Whether the leniency provision of the Florida Drug Trafficking Statute is unconstitutional because a) the phrase "substantial assistance" is impermissibly vague denying due process; or b) violates due process requirements of the Fourteenth Amendment by imparting unreviewable discretion solely to the prosecutor to move the sentencing court to reduce or suspend the mandatory minimum sentence.

IV

Whether the Florida Drug Trafficking Statute is violative of the Eigth Amendment's prohibition against cruel and unusual punishment by establishing severe mandatory minimum terms of incarceration upon a convicted defendant who chooses to remain silent and assert his privilege against self-incrimination; and precludes the trial judge from considering any mitigating factors.

(As to the Fourth Amendment Violation)

V

Whether petitioners' Fourth and Fourteenth Amendments rights in light of Frank v. Delaware were violated where the finding of probable cause was based on the police officer's affidavit in which he swore, with reckless disregard for the truth, that he observed clearly at night, through a visual aid, bales of marijuana being off-loaded from a boat by three white males, when he testified later at a suppression hearing that he could see only figures of persons carrying bundles to a house.

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INTRODUCTION

The appellants were defendants in the trial court (Circuit Court for Palm Beach County, Florida), and appellants in the highest appellate court of the State that could render a decision (District Court of Appeal of Florida, Fourth District). [1] Appellee was the prosecution in the trial court and appellee in the appellate court.

OPINIONS BELOW

The District Court of Appeal, Fourth District, entered a Per Curiam Affirmance, without opinion, affirming the trial court's finding that Section 893.135 (Florida Statutes 1979), is not violative of the Federal Constitution and finding that there was no illegal search and seizure in contravention of the Fourth and Fourteenth Amendments. [2]

A memorandum-type opinion is reported at 412 So.2d 501 (Fla. 4th DCA 1981).

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1. See Jurisdictional Statement at 4, n.4.

2. See appendix to Jurisdictional Statement at App. 1, App. 18, App. 22.

JURISDICTION

Jurisdiction is claimed based upon 28 U.S.C. §1257(2).

ARGUMENT

The State relies primarily upon Roberts v. United States, 445 U.S. 552, 63 L.Ed.2d 622, 1 S.Ct. 1358; Bordenkircher v. Hayes, 434 U.S. 357, 54 L.Ed.2d 604, 98 S.Ct. 663; Corbitt v. New Jersey, 439 U.S. 212, 58 L.Ed.2d 466, 99 S.Ct. 492; and Lefkowitz v. Cunningham, 431 U.S. 801, 53 L.Ed.2d 1, 97 S.Ct. 2132.

In Roberts v. United States, supra, this Court held that the district court in sentencing the defendant properly considered the defendant's refusal to cooperate with government officers, since by declining to cooperate the defendant rejected an obligation of community life that should be recognized before rehabilitation can begin, and the refusal to cooperate protected the defendant's former partners in crime thereby preserving his ability to resume criminal

activity upon release.

Significant to the case, sub judice, the Court in reply to Roberts' assertion that the trial court had punished him for exercising his Fifth Amendment privilege against self-incrimination when he refused to answer questions about his drug transactions and thereby received a more severe sentence, this Court opined:

> These arguments would have merited serious consideration if they had been presented properly to the sentencing judge.

Here, the Fifth Amendment violations of the questioned statute were brought to the trial court's attention during pre-trial proceedings (App. 34-62). Under the "escape valve" of the statute, the convicted and sentenced defendant must render the "substantial assistance" by cooperating before there is any proceeding before the

trial court. [3] Obviously, a sentenced defendant cannot invoke his Fifth Amendment privilege in the usual manner under the statutory procedure.

Turning to the State's cited case of Bordenkircher v. Hayes, supra, a state prosecutor carried out his threat made during plea bargaining to reindict the defendant who refused to plead guilty to a felony indictment punishable by a term

---

3. Section 893.135, (Florida Statutes 1979), provides in pertinent part:

> (3) The state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if he finds that the defendant rendered substantial assistance.

of two to ten years in prison by having the defendant reindicted under the state's habitual criminal statute, thus subjecting him to a mandatory live sentence in view of his prior felony convictions. In Bordenkircher, the defendant was faced with the alternatives of foregoing trial or facing charges on which he was already subject to prosecution. The state has missed the mark for, in the instant case, the coercive and compelling effect of the statute subjects the defendants to additional charges (state and federal) without any coextensive offer of immunity.

In Corbitt v. New Jersey, supra, the defendant was placed in the position of either pleading non vult to a murder charge and possibly receiving a sentence of not more than thirty years or life imprisonment; whereas, if he were convicted by a jury of first degree murder, there was a mandatory sentence of life imprisonment.

Defendant was tried by a jury and convicted of first degree murder. Accordingly he was sentenced to life imprisonment. On appeal, he argued that the mandatory life sentence following a first degree murder verdict was an unconstitutional burden upon his Fifth, Sixth and Fourteenth Amendment rights.

In Corbitt this Court found that the probability of leniency in entering a non vult plea does not invalidate the mandatory life sentence, there having been no assurances that a plea would have been accepted and that if it had been that a lesser sentence would have been imposed.

The Court held further that a state may encourage a guilty plea by offering substantial benefits in return for the plea.

This Court quoted from Bordenkircher:

> . . . [T]he state, through the prosecutor, had not violated the Constitution since it 'no more than openly presented the defendant with the unpleasant alternatives

> of foregoing trial or facing charges on which he was plainly subject to prosecution . . . .

In Bordenkircher and Corbitt, the defendants were involved in the plea bargaining process affording them difficult alternatives. In the case, sub judice, the defendants have been severely punished and sentenced to five years without any parole. They are confronted with a statutory provision which compels them to give "substantial assistance" by giving to the state attorney evidence, which by its very nature is incriminatory, without any coexisting offer of immunity in order to facilitate a reduction of sentence. The defendants were not compelled in Bordenkircher or Corbitt to reveal incriminating evidence in contravention of their Fifth Amendment privilege in order to strike a plea bargain. Those cases are inapplicable.

Finally, in Lefkowitz v. Cunningham, supra, the appeal presented the question whether a political party officer can be

removed from his position by the State of New York and barred for five years from holding any other party or public office, because he had refused to waive his constitutional privilege against compelled self-incrimination. This Court states that the government cannot penalize assertion of a constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized. [4]

Here the Florida Legislature passed a statute for the avowed purpose to compel, coerce and "rubber hose" convicted defendants sentenced to mandatory minimum terms without parole to give up their right to silence without any coexisting immunity and inform on others or forfeit any hope of leniency.

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4. This Court "suggested" to the New York authorities, that the prospective witness be granted "use immunity" so that it would not forfeit the opportunity to prosecute the witness on the basis of evidence derived from other sources.

Your Honors, a substantial federal question awaits your consideration and determination.

Respectfully submitted,

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